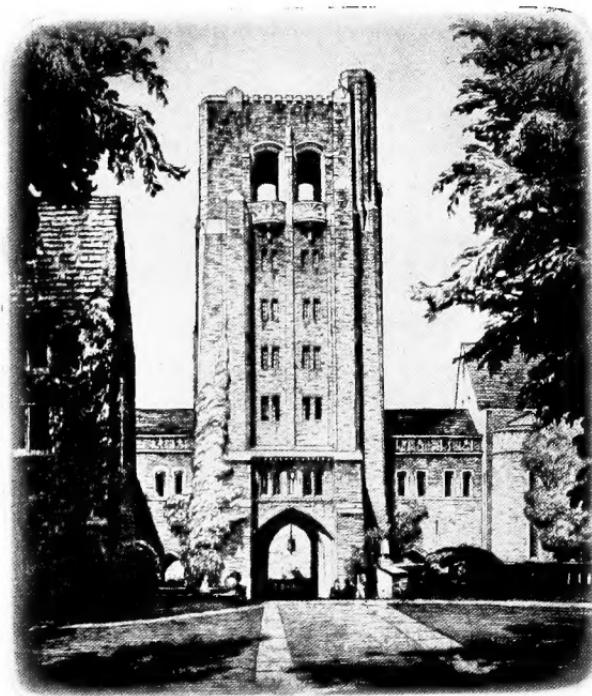


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A TREATISE  
ON THE LAW OF  
**PRIVATE CORPORATIONS**

**ALSO OF**  
**JOINT-STOCK COMPANIES**

**AND OTHER**  
**UNINCORPORATED ASSOCIATIONS**

**BY**  
**JAMES HART PURDY**  
OF THE CHICAGO BAR

**Enlargement, revision and reconstruction of Beach on Private Corporations**

**IN THREE VOLUMES**

**VOLUME III**

**CHICAGO**  
**T. H. FLOOD AND COMPANY**  
**1905**

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# THE LAW OF PRIVATE CORPORATIONS

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## CHAPTER XXXIX.

### ACTIONS AND DEFENSES BY CORPORATIONS.

<ul style="list-style-type: none"><li>§ 982. Power to sue and be sued.</li><li>983. Venue.</li><li>984. Discretion of directors to sue or defend.</li><li>985. Suit must be in the corporate name.</li><li>986. Parties plaintiff, who may be.</li><li>987. (a) Small stockholders as parties plaintiff.</li><li>988. (b) Corporate creditors as parties plaintiff.</li><li>989. (c) Receiver or assignee as party plaintiff.</li><li>990. (d) Transferee as a party plaintiff. Purchase of stock for purpose of suit.</li><li>991. Parties defendant. The corporation. The state.</li><li>992. (a) Directors as parties defendant.</li><li>993. (b) Outside persons who should be made defendants.</li><li>994. Necessary allegations in complaint against corporation.</li><li>995. (a) Allegations of agent's authority.</li><li>996. (b) Allegations in a suit by a corporation.</li><li>997. Verification of corporate pleadings.</li><li>998. Service of process.</li><li>999. Intervention by stockholders as parties.</li><li>1000. Control of the suit.</li></ul>	<ul style="list-style-type: none"><li>§ 1001. Corporate existence not to be collaterally attacked.</li><li>1002. Suits against corporations on promissory notes.</li><li>1003. Misnomer in pleadings.</li><li>1004. Plea of <i>nul tiel</i> corporation.</li><li>1005. (a) A "company" is <i>prima facie</i> a corporation.</li><li>1006. (b) Estoppel to deny corporate existence.</li><li>1006a. Defense of <i>ultra vires</i>. Statute of limitations. Laches.</li><li>1007. Evidence. Proof of corporate existence.</li><li>1008. (a) Evidence of corporate existence by certificates or copies.</li><li>1009. (b) Evidence of incorporation by performance of corporate acts, or admissions.</li><li>1010. (c) Evidence by production of corporate books.</li><li>1011. (d) Admissibility of evidence. Competency of witnesses.</li><li>1012. Sequestration of corporate property. Contempt of court.</li><li>1013. Judgment a bar to similar suits. Contribution among directors.</li><li>1014. Execution and attachment upon property of the corporation.</li></ul>
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Estoppel to deny corporate existence. Sections 79b; 79c, 125, 626.

Trust fund theory as to corporate stock. Sections 299-301c.

**§ 982. Power to sue and be sued.**—Among the incidental powers of corporations, is the power and capacity to sue, and to be sued, in the corporate name, like natural persons. This is expressly provided by the constitutions and statutes of many States.<sup>1</sup> but unnecessarily so, since the power is inseparably incident to the corporate existence.<sup>2</sup> Accordingly, in an action brought in a name appropriate for a corporation, or which may fairly import corporate character, the capacity to sue not being put in issue, the capacity to sue, and corporate existence, if necessary, will be presumed for the purposes of the suit; and, the incapacity to sue

<sup>1</sup> *Vide supra*, § 820; Stimson's Am. Stat. Law (1886), citing the constitutions of New York, Michigan, Minnesota, Kansas, Nebraska, North Carolina, Alabama, California and Nevada; *Home Protection v. Richards*, 74 Ala. 466; *Mobile Life Ins. Co. v. Pruett*, 74

Ala. 487; *Skinner v. Richardson*, 76 Wis. 464; *Isle of Wight Co. v. Smith*, 51 Hun, 562, 4 N. Y. Supp. 73.

<sup>2</sup> *Leggett v. New Jersey, etc. Co.* (1832), 1 N. J. Eq. 541, 23 Am. Dec. 728.

not appearing on the face of the complaint, it is not subject to demurrer founded on such objection, and will not support a judgment by default on appeal.<sup>3</sup> And again, when plaintiffs sue as trustees of an incorporated society, of a kind authorized by statute, the name under which the suit is prosecuted, imports a corporation, and shows a capacity to sue.<sup>4</sup>

§ 983. **Venue.**—A law which provides that an action shall be commenced and tried in the county in which the defendants reside, or may be found at the commencement of the action, applies to corporations, as well as to natural persons.<sup>5</sup> A statute, authorizing a corporation to be sued in any county in which it transacts business through its agents, is not an infringement of a constitutional provision that corporations shall be subject to be sued “in like cases as natural persons.”<sup>6</sup> The constitution of California provides that actions may be brought against a corporation in any county where it does business, or where the contract sought to be enforced was made or the liability incurred.<sup>7</sup> Statutory provisions that actions may be brought against insurance companies in any county where the cause of action arises, are remedial; and such an action may be brought in a county where the company has no agent.<sup>8</sup> But it is held in Louisiana that an action against a railroad company, for damages for injuries resulting from its neglect to maintain a sufficient crossing, must be brought at the domicile of the company, as these actions are not within the exception of the statute, providing that in all cases where any corporation shall commit trespass, or do anything for which an action for damages lies, it shall be liable to be sued in the parish where the damage is done or trespass committed.<sup>9</sup> Where a mining corporation is authorized by law to carry on business in any county, and it conducts its principal mining operations in one county, but has an office in another, for the purpose of electing its officers and conducting its financial operations,—it is within the jurisdiction of the proper court of the latter county.<sup>10</sup> Generally, the petition should

<sup>3</sup> Seymour v. Thomas Harrow Co. (1887), 81 Ala. 250.

<sup>4</sup> Smythe v. Scott (Ind. 1890), 24 N. E. Rep. 685.

<sup>5</sup> Holgate v. Oregon Pac. Ry. Co., 16 Oregon, 123.

<sup>6</sup> Home Protection v. Richards, 74 Ala. 466; Mobile Life Ins. Co. v. Pruett, 74 Ala. 487.

<sup>7</sup> Cal. Const. (1873), art. xii, § 16.

<sup>8</sup> Insurance Co. of North America v. McLimans (Neb. 1890), 44 N. W. Rep. 991.

<sup>9</sup> Caldwell v. Vicksburg, etc. R. Co. (1888), 40 La. Ann. 753, construing La. Code Prac., art. 165, subd. 9.

<sup>10</sup> Dade Coal Co. v. Haslett (1890), 83 Ga. 549.

allege that the corporation has an agent in the county, and the question of the relation of agency may be proved by acts or agreements constituting such a relation.<sup>11</sup> Where a complaint by a corporation in foreclosure, fails to show that it filed its articles of incorporation in the county where the property to be foreclosed, was situated (before suit, as provided by the code), its failure so to do, is a matter of abatement to be specially pleaded, otherwise it is waived.<sup>12</sup>

**§ 984. Discretion of directors to sue or defend.**—As to suits by, or against, the corporation, the directors have the exclusive discretion to bring or defend, and to manage the suit, and stockholders can not interfere with that discretion, except in case of fraud, *ultra vires* acts, or negligence by the directors,<sup>13</sup>

**§ 985. Suit must be in the corporate name.**—A suit whether by or against a corporation, must be in its corporate name, and not in the names of its officers. An action against William Milnes, President of the Shenandoah Railroad, is not an action against the corporation.<sup>14</sup>

**§ 986. Parties plaintiff. Who may be parties plaintiff.**—A director may sustain a bill to enjoin his co-directors for unlawfully alienating the corporate property without making the corporation a party; this is so under the New York code, which in provision for such a suit against trustees, makes no mention of the corporation as a party.<sup>15</sup> Generally, a stockholder who brings a suit in behalf of a corporation, must be registered on the corporate books as a stockholder.<sup>16</sup> A stockholder who is not qualified to take

<sup>11</sup> Bradstreet v. Gill (1888), 72 Tex. 115, 13 Am. St. Rep. 768.

<sup>12</sup> Ontario State Bank v. Tibbits (1889), 80 Cal. 68, construing Cal. Civ. Code, § 299.

<sup>13</sup> Ellerman v. Chicago, etc. Co., (1891), 49 N. J. Eq. 217; Edison v. Edison, etc. Co. (1894), 52 N. J. Eq. 620; Dickerman v. Northern T. Co. (1900), 176 U. S. 181; Railway Co. v. Alling (1878), 99 U. S. 463; Home, etc. Co. v. Mc-Kibben (1899), 60 Kan. 387, 56 Pac. 756; Meyer v. Bristol, etc. Co. (1901), 163 Mo. 59, 63 S. W. 96.

<sup>14</sup> Ogdensburg Bank v. Van Rensselaer (1843), 6 Hill, 240; Fidelity, etc. Co. v. Shenandoah

Valley R. R. (1890), 33 W. Va. \_\_\_, 11 S. E. 58; Licausi v. Ashworth (1903), 78 N. Y. App. Div. 486; Plemons v. Southern Imp. Co. (1891), 108 N. C. 614, 13 S. E. 188; Butler v. Holmes (Tex. 1902), 68 S. W. 52; State v. Montegudo (1896), 48 La. Ann. 1417, 20 South. 911. *Vide supra*, CORPORATE NAME, §§ 96, 101.

<sup>15</sup> Green v. Compton (1903), 83 N. Y. S. 588.

<sup>16</sup> Houston, etc. Co. v. Drew (1896), 13 Tex. Civ. App. 536, 13 S. W. 802; Hodge v. United States Steel Corp. (N. J. 1902), 53 Atl. 601; Lamson v. Stanley (1891), 15 N. Y. Supp. 707; Thompson v. Stanley (1892), 20 N. Y. Supp.

part in the suit, should not be made a plaintiff.<sup>17</sup> If a trustee stockholder refuses to bring the suit, the beneficiary may institute it and make the trustee a defendant.<sup>18</sup> An executor or administrator as stockholder, may be a party plaintiff.<sup>19</sup> One who has sold his stock, can not sue.<sup>20</sup> A stockholder may sue, although he has not completed payment for his stock.<sup>21</sup> A pledgor of stock may sue.<sup>22</sup> A pledgee may sue.<sup>23</sup> A holder of watered stock is sometimes disqualified to sue.<sup>24</sup> A holder of stock, is disqualified to sue when the corporate business is illegal.<sup>25</sup> A transferee of stock may sue; but in the federal courts he may not be plaintiff in suit to set aside *ultra vires* acts of the corporation. One who holds stock which has been voted in favor of an act, can not, as the holder of that stock, bring suit to attack the act.<sup>26</sup> To be a plaintiff in case of insolvency of the corporation, in a suit against directors for fraud,—plaintiff must allege that the relief asked will benefit him.<sup>27</sup>

**§ 987. (a) Small Stockholders as parties plaintiff.**—That the plaintiff owns but one share of stock, is not material to his right to sue. The smallness of one's holding, does not affect his right. But where the holder of a hundred shares out of seventy-four thousand shares sought to enjoin the corporation from engaging in *ultra vires* business, he was required to make out a very clear case, to be entitled to any relief.<sup>28</sup>

317, 73 Hun, 248 (1903); Brown v. Duluth Ry. (1893), 53 Fed. 889.

<sup>17</sup> Farwell v. Babcock (Tex. 1901), 65 S. W. 509.

<sup>18</sup> Mayer v. Denver, etc. R. R. Co. (1889), 38 Fed. 197.

<sup>19</sup> Jones v. Pearl Min. Co. (1894), 20 Colo. 417, 38 Pac. 700.

<sup>20</sup> Zinn v. Baxter (1901), 65 Ohio St. 341; MacVeagh v. Denver, etc. Co. (1901), 107 Fed. 17; Rafferty v. Donnelly (1900), 197 Pa. St. 423; Hodge v. United States Steel Corp., 53 Atl. 601; Hanna v. Peoples' Nat. Bank (1902), 76 N. Y. App. Div. 224.

<sup>21</sup> Buker v. Leighton, etc. Assn. (1900), 164 N. Y. 557.

<sup>22</sup> Fisher v. Patton (1895), 134 Mo. 32; Herbert, etc. Bank v. Bank of Orland (1901), 133 Cal. 64.

<sup>23</sup> Smith v. Smith, etc. Co. (1900), 125 Mich. 234; Farmers'

Bank v. Ohio R. etc. Co. (Ky. 1900), 56 S. W. 719; Green v. Hedenberg (1896), 159 Ill. 489, 50 Am. St. Rep. 178; Campbell v. Am. Zylonite Co. (1890), 122 N. Y. 455.

<sup>24</sup> Hinckley v. Pfister (1892), 83 Wis. 64.

<sup>25</sup> Coquard v. National, etc. Co. (1898), 171 Ill. 480; Le Warne v. Meyer (1889), 38 Fed. 191.

<sup>26</sup> Barr v. New York, etc. R. R. Co. (1891), 125 N. Y. 263; Brown v. Duluth Ry. (1893), 53 Fed. 889; Wood v. Corry, etc. Co. (1890), 44 Fed. 146; Symms v. Union Trust Co. (1894), 60 Fed. 830.

<sup>27</sup> Darragh v. Wetter Manuf. Co. (1897), 78 Fed. 7; Smith v. Ferris, etc. Ry. (Cal. 1897), 51 Pac. 710.

<sup>28</sup> Trimble v. American, etc. Co. (1901), 61 N. J. Eq. 340; Gier v.

§ 988. (b) Corporate creditors as parties plaintiff.—A simple creditor can not sue, to make the directors or officers' account for *ultra vires* or illegal acts. He has no interest in any particular property of the corporation, until after judgment obtained and returned unsatisfied. Except that his debt be paid, he has no interest in the corporate property, or management, or in the acts of stockholders or officers. "Neither the insolvency of a corporation, nor the execution of an illegal trust deed, nor the failure to collect in full, all stock subscriptions, nor all together, gives to a simple contract creditor of the corporation, any lien on its property, or charges any direct trust thereon."<sup>29</sup> A creditor of the corporation, who seeks to set aside a fraudulent sale to a director, must, in his bill, allege a judgment at law unsatisfied, or allege that the company has no property.<sup>30</sup> In case of dissolution of the corporation, and a judgment can no longer be obtained against it, a suit may be brought in behalf of all the creditors, by bill in equity, to reach corporate property unlawfully transferred, and may make all the transferees defendants to the suit.<sup>31</sup> "The officers of a corporation act in a fiduciary capacity, in respect to its property in their hands, and may be called to an account for fraud, or sometimes even for mere mismanagement in respect thereto; but, as between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor."<sup>32</sup> A corporate creditor can not intervene in a stockholder's suit against the directors for fraud.<sup>33</sup> A judgment creditor's remedy is in equity, and not at law.<sup>34</sup> Where a creditor also a stockholder, seeks to establish a claim for money paid to the corporation, the evidence must clearly show that the money was advanced as a loan, otherwise the presumption will be that the payment was for stock.<sup>35</sup>

Amalgamated, etc. Co. (1901), 61 N. J. Eq. 364; *Vide*, §§ 948, 989, 990. *Vide* §§ 948, 989, 990.

<sup>29</sup> Hollins v. Brierfield, etc. Co. (1893), 150 U. S. 371.

<sup>30</sup> Kittel v. Augusta, etc. R. R. (1895), 65 Fed. 859; Streight v. Junk (1893), 50 Fed. 321.

<sup>31</sup> Pullman v. Stebbins (1892), 51 Fed. 10.

<sup>32</sup> Hollins v. Brierfield, etc. Co. (1893), 150 U. S. 371. *Vide supra*, TRUST FUND THEORY AS TO STOCK, §§ 299-301c.

<sup>33</sup> Smith v. Geo. T. Smith, etc. Co. (1898), 119 Mich. 11.

<sup>34</sup> Braem v. Merchants' Nat. Bank (1891), 127 N. Y. 508; Consolidated Tank, etc. Co. v. Kansas City, etc. Co. (1891), 45 Fed. 7; Pullman v. Stebbins (1892), 51 Fed. 10; Cummings v. American Gear, etc. Co. (1895), 87 Hun, 598.

<sup>35</sup> Hollins v. American, etc. Co. (N. J. Eq. 1903), 56 Atl. 104.

§ 989. (c) **Receiver, or assignee, as a party plaintiff.**—Upon appointment of a receiver, the directors become responsible to him, and not to the stockholders, for any mismanagement of the corporation.<sup>36</sup> He may hold liable a director, where in the consolidation of the corporation with another, the director has used large sums of money of the corporation, to effect the consolidation, resulting in insolvency of the corporation.<sup>37</sup> The receiver may proceed against the directors, in an action for negligence;<sup>38</sup> and this suit may be in equity.<sup>39</sup> Where the receiver can not hold a director liable for negligence, a stockholder, or a creditor, may hold him liable.<sup>40</sup> The receiver can maintain only such suits as the corporation may maintain.<sup>41</sup> He may, at law, bring a suit for conversion, where the insolvent corporation has illegally transferred property,<sup>42</sup> and suit in equity to set aside illegal transfers of property made by the corporation to the directors.<sup>43</sup> Before bringing suit against directors for negligence, or against stockholders on their liability upon stock issued to them in payment for property taken at overvaluation, the receiver must have special permission from the court.<sup>44</sup> When a stockholder sues the directors in the interest of a rival company, or purchases stock for the purpose of bringing suit, the court will dismiss it, as a fraud upon the court, and will dismiss a suit, when it is brought by a stockholder in his behalf, and that of others, against the directors, to enjoin them, or for accounting, when the suit is shown to be, not for the benefit of the stockholders, but in the interest of some other corporation.<sup>45</sup> After his appointment, a receiver must be made a party defendant, to any suit by a stockholder, to compel corporate officers to account for misappropriation of corporate property.<sup>46</sup>

<sup>36</sup> Howe v. Barney (1891), 45 Fed. 668.

<sup>37</sup> Person v. Cronk (1890), 12 N. Y. Supp. 845; Mason v. Cronk (1891), 125 N. Y. 496.

<sup>38</sup> Robinson v. Hall (1894), 59 Fed. 648; O'Brien v. Fitzgerald (1894), 143 N. Y. 377.

<sup>39</sup> Fisher v. Parr (1901), 92 Md. 245.

<sup>40</sup> Briggs v. Spaulding (1891), 141 U. S. 132.

<sup>41</sup> Young v. Stevenson (1899), 180 Ill. 608, 72 Am. St. Rep. 236.

<sup>42</sup> McQueen v. New (1899), 45

N. Y. App. Div. 579; Varnum v. Hart (1890), 119 N. Y. 101.

<sup>43</sup> Jones v. Blun (1895), 145 N. Y. 333; Milbank v. De Riesthal (1894), 82 Hun, 537.

<sup>44</sup> Simmons v. Taylor (Tenn. 1901), 63 S. W. 1123.

<sup>45</sup> Watson v. LeGrand, etc. Co. (1898), 177 Ill. 203; Jenkins v. Auburn City Ry. (1898), 27 N. Y. App. Div. 553; Beshoar v. Chappell (1895), 6 Colo. App. 323, 40 Pac. 244.

<sup>46</sup> Swope v. Villard (1894), 61 Fed. 417; Porter v. Sabin (1893), 149 U. S. 473.

*Assignee*.—A suit by depositors in a bank, to hold its directors personally liable for negligence in its management, must be for the benefit of the assignee, and both he, and the bank, must be made parties defendant.<sup>47</sup>

**§ 990. (d) Transferee as a party plaintiff. Purchase of stock for purpose of suit.**—The transferee of stock, at common law, has the same right to bring a suit against the directors, that his transferrer had. He need not show when, or where, he acquired his stock.<sup>48</sup> Though he purchased his stock for the very purpose of bringing suit to enjoin an *ultra vires* act, he may obtain the injunction. His motive in buying the stock, the court can not inquire into.<sup>49</sup> But the courts do not favor parties, who buy stock for the mere purpose of bringing suit; and where neither public, or private interests are to be protected, the court will deny an injunction, if the rights of parties may be preserved, by awarding damages instead.<sup>50</sup>

**§ 991. Parties defendant. The corporation. The State.**—The corporation is a necessary defendant to a stockholder's suit for relief against any wrong which the corporation itself has neglected to remedy.<sup>51</sup> Where the suit is to enjoin the corporation from owning stock in a competing railroad, it is a necessary party defendant.<sup>52</sup>

*Corporations, in which the State has an interest*.—Although the State is the only stockholder and proprietor of a corporation, it may nevertheless be sued.<sup>53</sup>

**§ 992. (a) Directors as parties defendant.**—Where the only purpose is to enjoin an act or set aside an *ultra vires* act, the di-

<sup>47</sup> Gores v. Field (1901), 109 Wis. 408.

<sup>48</sup> Montgomery, etc. v. Lahey (1899), 121 Ala. 131, 25 South. 1006.

<sup>49</sup> Carson v. Iowa, etc. Co. (1890), 80 Iowa, 638; McFadden v. May's Landing, etc. R. R. (1891), 49 N. J. Eq. 176; Toler v. East Tennessee, etc. Ry. (1894), 67 Fed. 168; Guardian, etc. Co. v. White Cliffs, etc. Co. (1901), 109 Fed. Rep. 523.

<sup>50</sup> Kingman v. Rome, etc. R. R. 30 Hun, 73; Venner v. Farmers' etc. Co. (1900), 54 N. Y. App. Div. 271. *Vide* §§ 948, 987, 989.

<sup>51</sup> Bruschke v. Nord. Chicago, etc. Co. (1893), 145 Ill. 43; Mount

v. Radford, etc. Co. (1896), 93 Va. 427, 25 S. E. 244; Willoughby v. Chicago, etc. Co. (1892), 50 N. J. Eq. 656; Eldred v. American, etc. Co. (1900), 105 Fed. 457; Kyle v. Wagner (1898), 45 W. Va. 349, 32 S. E. 213; Niles v. New York, etc. R. R. (1902), 69 N. Y. App. Div. 144.

<sup>52</sup> Minnesota v. Northern, etc. Co. (1902), 184 U. S. 199; Taylor v. Union Pac. Ry. Co. (1903), 122 Fed. 147.

<sup>53</sup> Briscoe v. Bank of Kentucky, 11 Pet. 257; Bank of U. S. v. Planters' Bank of Georgia, 9 Wheat. 904; Moore v. Wabash etc., 7 Ind. 462.

rectors should not be made parties defendant. The decree binds all the corporate officers,<sup>54</sup> but they are necessary parties defendant in suits to hold them personally liable for negligence or fraud.<sup>55</sup>

**§ 993. (b) Outside persons who should be made defendants.** They, whose rights are to be affected by the relief asked, should also be joined as parties defendant. In the case of the Northern Securities company, where the State of Minnesota sought, in the United States Supreme Court, to enjoin that company from owning or voting a majority of the capital stock of the Great Northern Railway and the Northern Pacific Railway companies, the court dismissed the suit, because they were absent persons, materially interested, but were not made parties defendant; and, because to bring them in would oust the court of its jurisdiction.<sup>56</sup>

**§ 994. Necessary allegation in complaint against corporation.**—An allegation in the petition that a defendant is a private corporation, is sufficient, without alleging by what authority it was incorporated.<sup>57</sup> And a complaint, or summons, against a railroad company designating it by its corporate name, need not allege its corporate capacity.<sup>58</sup> So, held, in an action against the Adams Express Company, it is not necessary to specifically aver that it is a corporation; its name imports that such is the case.<sup>59</sup> And a complaint which alleges that defendant is a corporation, but which fails to allege whether it is a foreign or domestic corporation, is not demurrable, as not stating facts sufficient to constitute a cause of action.<sup>60</sup> Where there is an allegation of the corporate existence in the complaint, before the causes of action, it is unnecessary that it should re-appear in each averment of a cause of action.<sup>61</sup> But it has been held in California, that an averment of the defendant's corporate existence is necessary in every count of a complaint against a corporation.<sup>62</sup> A complaint, in an action against a corporation for services, alleging that plaintiff was

<sup>54</sup> *Allen v. New Jersey, etc. R. R. Co.* (1875), 49 How. Pr. 14; *Woodruff v. Howes* (1891), 88 Cal. 184.

<sup>55</sup> *Gray v. Fuller* (1897), 17 N. Y. App. Div. 29; *Edwards v. Bay State, etc. Co.* (1898), 91 Fed. 944.

<sup>56</sup> *Minnesota v. Northern, etc. Co.* (1902), 184 U. S. 199.

<sup>57</sup> *Houston, etc. Co. v. Kennedy* (1888), 70 Tex. 233.

<sup>58</sup> *Stanly v. Richmond, etc. R. Co.*, 89 N. C. 331; *Snyder v. Phila-*

*delphia Co. (W. Va. 1903)*, 46 S. E. 366.

<sup>59</sup> *Adams Ex. Co. v. Harris* (1889), 120 Ind. 73.

<sup>60</sup> *Rothchild v. Grand Trunk Ry. Co.* (1890), 10 N. Y. Supp. 36.

<sup>61</sup> *West v. Eureka Imp. Co.* (1889), 40 Minn. 394.

<sup>62</sup> *People v. Central Pac. R. Co.* (1890), 83 Cal. 393; *People v. California Pac. R. Co.* (Cal. 1890), 23 Pac. Rep. 310; *Loup v. California, etc. R. Co.*, 63 Cal. 99.

employed by defendant through its secretary, naming him, need not aver the secretary's authority to bind the corporation.<sup>63</sup> A complaint, stating the full amount of capital stock, and the amount subscribed by four stockholders, joined with the corporation as defendants, does not imply that all the stockholders were joined, or that the stock subscribed by them, was the total amount subscribed; and therefore the fact that all the capital stock was not subscribed, not appearing in the complaint, can not be reached on demurrer, but must be pleaded in defense.<sup>64</sup> In another case, the complaint averred that the defendant claimed to be an existing corporation, by virtue of, and under, the provisions of several statutes, which it enumerated. The original act authorized a corporation for the transmission of letters and other parcels by pneumatic tubes. One of the amendatory acts authorized it to construct and operate a railway by means of tubes of enlarged diameter. The complaint also averred that the corporation could not avail itself of the benefits of this act, through its failure to construct the portions of the railway, required by the act to be constructed within a specified time. And, under these averments, it was held that the plaintiffs could not, on demurrer to the complaint, avail themselves of the objection that the act had become inoperative, by reason of the failure of the corporation to accept its provisions.<sup>65</sup>

**§ 995. (a) Allegations of agent's authority.**—As a corporation can act only by its agents, in an action against it for a breach of contract, it is sufficient to aver that the corporation made the contract.<sup>66</sup> Accordingly, a complaint, which *in haec verba*, alleges a contract, made by a corporation, purporting to be signed by the president of the company, need not aver the authority of the president to make the contract, the want of authority being matter of defense.<sup>67</sup> An allegation of that character sufficiently shows, as against demurrer, that the president was authorized to make the contract.<sup>68</sup> In order to interpose as a defense, a want of authority in the president, to enter into the contract, according to

<sup>63</sup> Sullivan v. Grass Val., etc. Co. (1888), 77 Cal. 418.

<sup>64</sup> Tabor v. Goss, etc. Manuf. Co. (Colo. 1888), 18 Pac. Rep. 537.

<sup>65</sup> Bailey v. New York, etc. Ry. Co. (1888), 1 N. Y. Supp. 304, following Astor v. New York, etc. Ry. Co. (1888), 48 Hun, 562.

<sup>66</sup> Rochester v. Shaw, 100 Ind. 268; Sullivan v. Grass Val. etc. Co., 77 Cal. 418.

<sup>67</sup> Malone v. Crescent City, etc. Co. (1888), 77 Cal. 38.

<sup>68</sup> St. Paul Land Co. v. Dayton (1887), 37 Minn. 364.

the statutory requirements, the facts must be pleaded.<sup>69</sup> The validity of the acts of its officers *de facto*, can not be impeached by the corporation.<sup>70</sup>

**§ 996. (b) Allegations in a suit by a corporation.**—It is unnecessary to allege every fact essential to the existence of the corporation.<sup>71</sup> And an allegation that the plaintiff is a body, duly and legally incorporated by, and under, the laws of the State, is sufficient under a statute providing, that in pleading the charter or act of incorporation, it shall be sufficient to allege that the corporation was duly incorporated.<sup>72</sup> But a corporation may be required to state whether it is a domestic, or foreign corporation.<sup>73</sup> And in that case, it is sufficient, if the complaint alleges that it was created first under the statutes of other States, and also under a specified chapter of the laws of the State of the forum.<sup>74</sup> A complaint by a corporation, for the enforcement of a contract, made by it with the defendant, need not allege that it was empowered to make the contract.<sup>75</sup> For, an allegation by a corporation, that plaintiff and defendant entered into an agreement to, and with, each other, includes and implies the plaintiff's capacity and power to make the agreement.<sup>76</sup> And again, where the incorporation is not by public act, and the corporation sues upon a contract not made in the name, by which it sues, the fact of incorporation should be averred, and, on a general denial, it should be proved, yet, after a verdict in the corporation's favor, it will be presumed to have been conceded or proven.<sup>77</sup>

**§ 997. Verification of corporate pleadings.**—Corporations must plead as to facts, practically as individuals. Thus, although a corporation can not be compelled to answer to a bill in equity, under oath, it can be required to answer, and must answer fully.<sup>78</sup> So, also, generally, in a suit against a corporation, the answer should be made by the principal officer of the corporation, who

<sup>69</sup> Kenner v. Lexington Manuf. Co., 91 N. C. 421.

<sup>70</sup> Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548.

<sup>71</sup> Washer v. Allensville, etc. Co., 81 Ind. 78.

<sup>72</sup> Texas, etc. Ry. Co. v. Virginia Ranch, etc. Co. (Tex. 1888), 7 S. W. Rep. 341.

<sup>73</sup> National Temperance Soc. etc. v. Anderson (1888), 2 N. Y. Supp. 49.

<sup>74</sup> American, etc. Soc. v. Foote (1888), 52 Hun, 307.

<sup>75</sup> St. Paul Land Co. v. Dayton (1887), 37 Minn 364.

<sup>76</sup> La Grange Mill Co. v. Bennewitz, 28 Minn. 62.

<sup>77</sup> Girls' Industrial Home v. Fritchey, 10 Mo. App. 344.

<sup>78</sup> Gamewell, etc. Co. v. Mayor (1887), 31 Fed. Rep. 312.

should be able to admit, or deny, the facts charged, and questions put, or to state want of knowledge, clearly and truly, as a reason for not doing either.<sup>79</sup> And, again, a verification to a complaint made by an officer of a corporation, need not set forth "his knowledge, or the grounds of his belief on the subject, and the reasons why it was not made by the party;" for a corporation acts only through its officers and agents; and his verification is the verification of the corporation itself.<sup>80</sup> And, under a statute, which provides for the oral examination of a garnishee, and applies the provision to corporations, a corporation must answer by an officer who can answer knowingly.<sup>81</sup> But in an action against a corporation, an answer verified by its treasurer, denying, upon information and belief, each and every allegation of the complaint, creates an issue of fact, which must be disposed of by a trial.<sup>82</sup> Under a statute, requiring the pleadings of domestic corporations to be verified by an officer thereof, a verification by one, who stated in the affidavit that he was the former president of the defendant corporation; that all the officers, including himself, had tendered their resignations; and, that no other officers have yet been elected or chosen in their places,—is insufficient.<sup>83</sup> And, under the same law, the answer of a defendant domestic corporation, which is verified by one who simply affirms that he is "general manager" thereof, stating nothing in regard to his duties,—is defective, although by another subdivision of the section, service might be made upon the managing agent.<sup>84</sup>

**§ 998. Service of process.**—Service must be upon the president, or other principal officer of the corporation within the State, or other jurisdiction.<sup>85</sup> Service upon the president or other corporate officer, as an individual, is not service on the corporation.<sup>86</sup> Where a contract is to be performed in another State, suit may be brought in that State, and process served on the president,

<sup>79</sup> *Hale v. Continental Life Ins. Co.*, 16 Fed. Rep. 718.

<sup>80</sup> *Commercial Bank v. Hutchison*, 87 N. C. 22.

<sup>81</sup> *Ex parte Cincinnati, Selma, etc. Ry. Co.*, 78 Ala. 258, construing Ala. Code, §§ 3293, 3267.

<sup>82</sup> *Macaulay v. Bromell, etc. Co.*, 67 How. Pr. 252, 14 Abb. N. C. 316.

<sup>83</sup> *Kelley v. Woman Pub. Co.* (1888), 4 N. Y. Supp. 99, constru-

ing N. Y. Code Civ. Proc., § 525, subd. 1.

<sup>84</sup> *Meton v. Isham Wagon Co.* (1888), 4 N. Y. Supp. 215.

<sup>85</sup> *Kansas City, etc. R. R. Co. v. Daughtry* (1891), 138 U. S. 298; *DeWolf v. Mallett* (1835), 3 Dana (Ky.), 214.

<sup>86</sup> *Kirkpatrick, etc. Co. v. Central, etc. Co.* (Ind. 19—), 65 N. E. 913; *Wilson v. California, etc. Co.* (1893), 95 Mich. 117.

while there.<sup>87</sup> It was held to be a good appearance, where an agent, authorized to accept service, caused appearance to be entered without service, and for three years plaintiff did not object.<sup>88</sup> A judgment by default, must show proper service made upon a corporate officer.<sup>89</sup> Service is good when made upon the president, although he is attorney for the defendant corporation.<sup>90</sup> Although the year has expired, for which the president and director of a railroad was elected, where the election was annual, he is presumed to continue in office, and service upon him, is good service upon the corporation.<sup>91</sup> Where in case of suit to foreclose mortgage, service was accepted in the name of the mortgagor corporation, by the acting president who was agent of the mortgagee, the decree was set aside, as fraudulently obtained.<sup>92</sup> Service of summons must be upon the identical agent provided by statute; and if a general agent is designated, service upon a foreman is not sufficient.<sup>93</sup> Accordingly, under an act providing that personal service of a summons on a domestic corporation shall be by delivering a copy to the treasurer, among others,—service on an assistant treasurer, holding none of the enumerated positions, is irregular and void.<sup>94</sup> A sheriff's return, showing service on a person designated by name "as president" of a certain company, "who is the owner of said goods," is sufficient to show service on the company.<sup>95</sup> A return upon a summons, which states that a copy was left with the book-keeper and agent of the company, naming him, at the only office of the company in the county, said book-keeper being in charge thereof, is sufficient, under an act which provides that, in the absence of the president or chief officer, a summons against an incorporated company may be served by leaving a copy thereof at any business office of said company, with the person having charge thereof.<sup>96</sup> The failure to show, in the return on a summons served upon a corporation, that service

<sup>87</sup> Payne v. East, etc. Co. (La. 1903), 33 South. 739.

<sup>88</sup> Alliance, etc. Co. v. Bartlett (1899), 9 N. M. 554.

<sup>89</sup> Southern, etc. Assn. v. Gillespie (1899), 121 Ala. 295, 25 South. 564.

<sup>90</sup> United States, etc. v. Spencer (1899), 46 W. Va. 590, 33 S. E. 242.

<sup>91</sup> Buell v. Baltimore, etc. R. R. Co. (1899), 39 N. Y. App. Div. 236.

<sup>92</sup> Fox v. Robbins (Tex. 1901), 62 S. W. 815.

<sup>93</sup> Great Western Mining Co. v. Woodmas of Alston Mining Co. (1888), 12 Colo. 46, 13 Am. St. Rep. 204.

<sup>94</sup> Winslow v. Staten Island, etc. R. Co. (1888), 2 N. Y. Supp. 682.

<sup>95</sup> Grand Rapids Chair Co. v. Runnels (Mich. 1890), 43 N. W. Rep. 1006.

<sup>96</sup> Hill v. St. Louis, etc. Co. 90 Mo. 103.

was had in the county where the company kept its principal office, or carried on its principal business,—does not render the return defective; the law in force, at the time of service, not containing those requirements.<sup>97</sup> Having recognized or taken advantage of a service, the corporation can not afterward complain of it.<sup>98</sup> But where the representative of a railroad corporation is served with process, he may plead in abatement, in his own name, that the corporation is extinct, or he may make the same defense, by motion to dismiss the suit, or by suggestion of his attorney of record, supported by affidavit showing the facts.<sup>99</sup>

**§ 999. Intervention by stockholders as parties.**—A stockholder may intervene and defend in his own name, in a suit where fraudulently the corporation does not defend,<sup>1</sup> or is not protecting the stockholder's interests against the reckless sale by a receiver, of property of an insolvent corporation.<sup>2</sup> A court of equity having, by its receiver, possession of the property of an insolvent corporation, is not required to allow intervention by a stockholder, in a foreclosure suit by bondholder's trustee, brought to enforce stockholders' liability, instead of foreclosure to enforce the mortgage security.<sup>3</sup>

**§ 1000. Control of the suit.**—The plaintiff stockholder retains control of the suit, and until decree, may compromise, continue, or dismiss, the case.<sup>4</sup>

**§ 1001. Corporate existence not to be collaterally attacked.** A person who has contracted with a *de facto* corporation, and received the benefit of his contract, can not afterwards object that it was never legally organized, or that the law, under which it was organized, is unconstitutional.<sup>5</sup> The validity of a corporate charter can not be questioned collaterally by those claiming adverse rights,<sup>6</sup> but only by the State.<sup>7</sup> Accordingly, one sued by a water

<sup>97</sup> *Tabor v. Goss, etc. Manuf. Co.* (1888), 11 Colo. 419.

<sup>2</sup> *State v. Holmes* (1900), 60 Neb. 39.

<sup>98</sup> *Lewis v. Glenn*, 84 Va. 947; *Pressman v. Mason*, 68 Md. 78.

<sup>3</sup> *Land, etc. Co. v. Asphalt Co.* (N. J. 1903), 127 Fed. 1 (U. S. C. A.).

<sup>99</sup> *Kelley v. Mississippi Central R. Co.*, 2 Flip. C. Ct. 581.

<sup>4</sup> *Hirshfield v. Fitzgerald*, 157 N. Y. 166 (1898).

<sup>1</sup> *Cornell v. Sims* (1900), 111 Ga. 828, 36 S. E. 267; *Fitzwater v. National Bank, etc.* (1900), 62 Kan. 163, 61 Pac. 684, 84 Am. St. Rep. 684.

<sup>5</sup> *Winget v. Quincy, etc. Assn.* (1889), 128 Ill. 67.

<sup>2</sup> *German Ins. Co. v. Strahl*, 13 Phila. 512. And in an action, by

<sup>6</sup> *Jersey City Gas Light Co. v. Consumers' Gas Co.*, 40 N. J. Eq. 427.

company, for water used, can not set up, by way of defense, a defect in the organization of the corporation. The defect can be taken advantage of only by the power creating the corporation.<sup>8</sup> And the legality of the incorporation of an acting corporation, can not be questioned, in an action by it on a transferable contract, of which it is the equitable assignee.<sup>9</sup> Neither can the right of a corporation, to exercise its franchises, be inquired into, collaterally; as, for instance, the ownership of a wagon-road claimed by a corporation, can not be inquired into, in a proceeding by a third party, to compel the county authorities to fix rates of toll.<sup>10</sup> Nor, in an action by a turnpike company for the recovery of tolls, can the defense be set up, that the company has not complied with the requirements of its charter, and that the road was not in a proper state, when the defendant passed over it,—as the company is answerable for such delinquencies only to the public, and in a public prosecution.<sup>11</sup> So, its capacity to hold real estate, can not be attacked, collaterally.<sup>12</sup>

**§ 1002. Suits against corporations on promissory notes.—** The code of New York provides that, in an action against a corporation to recover damages for the non-payment of a promissory note, unless the defendant serves, together with a copy of his answer or demurrer, a copy of an order of a judge directing that the issues presented by the pleadings be tried, the plaintiff may take judgment, as in case of default. This law, however, has no application to an answer served by a corporation, in a suit brought against it as indorser.<sup>13</sup> But an action against a domestic corporation, by an indorser of its accommodation paper, to recover

a bridge company, to compel an accounting by its president and managing officer, the referee allowed defendant credit for work done and materials furnished and money advanced by him in the construction of the bridge, after the articles had been executed and filed with the recorder of the county, but before the articles were filed in the office of the secretary of state, and it was held that although, in the absence of such filing, plaintiff did not become a corporation *de jure*, it was a corporation *de facto*, and its corporate existence could not be ques-

tioned by plaintiff in a collateral proceeding. *Grand River Bridge Co. v. Rollins* (1889), 13 Colo. 4.

<sup>8</sup> *Boise City Canal Co. v. Pinkham*, 1 Idaho, N. S. 790.

<sup>9</sup> *Toledo & A. A. R. Co. v. Johnson*, 55 Mich. 456.

<sup>10</sup> *Weaversville, etc. Co. v. Trinity County Supervisors*, 64 Cal. 69.

<sup>11</sup> *Stults v. East Brunswick, etc. Co.* (1887), 48 N. J. 596.

<sup>12</sup> *Alexander v. Tolleston Club*, 110 Ill. 65.

<sup>13</sup> *Shorer v. Times, etc. Co.* (1890), 119 N. Y. 483, 53 Hun, 88, construing N. Y. Code Civ. Proc., § 1778.

for payment of protested notes, is within the statute.<sup>14</sup> And when a corporation is sued upon a note, and fails to serve, with its answer, an order of court directing a trial, as required by the New York code, the plaintiff can have judgment entered, without making application to the court.<sup>15</sup> Declarations of the president of a corporation,—that a note indorsed to it long before, and on which suit had been brought six months before, was not corporate property, but indorsed only, that suit might be brought in the United States court,—are not admissible, without any showing that the president had authority to make the declarations, or had some duty in the premises, or was held out as the officer, to whom application for information should be made.<sup>16</sup>

**§ 1003. Misnomer in pleadings.**—A corporation, like an individual, may be known by more than one name, and can only take advantage of a misnomer by plea in abatement.<sup>17</sup> But services rendered one company, can not be recovered for, in a suit against a company of a similar name, on the assumption that the two are virtually one, without allegation and proof of the identity.<sup>18</sup> The fact that a corporation has changed its name, without any change in its membership, is no defense to an action instituted against it under its former name.<sup>19</sup> And, where an incorporated company attempted to change its name, but failed, through non-compliance with the method prescribed by statute, and afterwards obtained a judgment in the new name, objection can not be made after judgment, if the complaint stated facts which identified the company.<sup>20</sup> A statute providing that actions are not abated by death or disability of a party, does not apply to corporations which have consolidated.<sup>21</sup> A corporation, after having appeared in, and

<sup>14</sup> *Ford v. Binghamton, etc. Co.* (1890), 54 Hun, 451.

<sup>15</sup> *Hutson v. Morrisania Steamboat Co.*, 12 Abb. N. Cas. 278, 64 How. Pr. 268.

<sup>16</sup> *Tuthill Spring Co. v. Shaver Wagon Co.* (1888), 35 Fed. Rep. 644.

<sup>17</sup> *Louisville & N. R. Co. v. Reidmond*, 11 Lea, 205.

<sup>18</sup> *McGregor v. Fuller, etc. Co.* (1887), 72 Iowa, 464.

<sup>19</sup> *Welfley v. Shenandoah, etc. Co.*, 83 Va. 768.

<sup>20</sup> *King v. Ilwaco Ry. & Nav. Co.* (Wash. 1890), 23 Pac. Rep. 924.

<sup>21</sup> *Kansas, O. & T. Ry. Co. v. Smith*, 40 Kan. 192, 19 Pac. Rep. 636, construing Kan. Civ. Code, § 40: But under a law which provides that no action to which the old corporation was a party shall be abated by reason of consolidation pending suit, but that the cause shall proceed as if the consolidation had not taken place, or that the new corporation shall be substituted by order of court, it was held on motion to dismiss a bill filed by a corporation subsequently consolidated, on the ground that plaintiff's corporate existence was terminated by the

defended, an action against it, under an erroneous name, and instituted proceedings in another court, under the same name, can not, after the lapse of several years, have the decree opened, and all the proceedings against it set aside, on account of the misnomer.<sup>22</sup> The proper way of taking advantage of a misnomer, is by plea in abatement. Return of service of process can not be quashed for misnomer, upon an affidavit which does not show the true name.<sup>23</sup> Action against a corporation by its former name, will not be defeated by its change of name, without showing its change of membership.<sup>24</sup> Naming the defendant, in a petition, as underwriters Fire Assoc., at Dallas, instead of its corporate name, Underwriters Fire Assoc., etc. of Dallas, is not a material variance.<sup>25</sup> It was unnecessary, in an action by the manager of a corporation, on a contract made for its benefit, that he should describe himself as manager, in his pleadings.<sup>26</sup>

**§ 1004. Plea of nul tiel corporation.**—If a plaintiff alleges itself to be a corporation, the fact need not be proved, unless positively denied.<sup>27</sup> When, to an action by a corporation, the plea of *nul tiel* corporation in proper form is interposed, the burden is on the plaintiff to prove its corporate existence, either by producing its charter or articles of incorporation, or by some admission on the part of the defendant, or by showing a state of facts that will operate as an estoppel.<sup>28</sup> But a person sued by a corporation, can not successfully question its existence; when the statute law for such corporations and user are shown.<sup>29</sup> And, under a law

consolidation, and that a bill of review was necessary, and on counter-motion to substitute the consolidated corporation, that the suit did not abate, and that the latter motion should prevail. *Edison Electric Light Co. v. Westinghouse*, 34 Fed. Rep. 232.

<sup>22</sup> *Bate Refrigerating Co. v. Gillett*, 31 Fed. Rep. 809.

<sup>23</sup> *Wilhite v. Convent, etc.* (Ky. 1904), 78 S. W. 138, 25 Ky. Law Rep. 1375; *Pike, Morgan & Co. v. Wathen* (Ky. 1904), 78 S. W. 138, 25 Ky. Law Rep. 1375.

<sup>24</sup> *Wilhite v. Convent, etc.* (Ky. 1904), 78 S. W. 138.

<sup>25</sup> *Underwriters' Fire Assn. v. Henty* (Tex. Civ. App. 1904), 79 S. W. 1072.

<sup>26</sup> *McKee v. Needles* (Iowa, 1904), 98 N. W. 618. *Vide supra*, MISNOMER, §§ 99, 101.

<sup>27</sup> *Vide supra*, PLEA OF NUL TIEL CORPORATION, §§ 99a, 731. *Concordia Savings Assn. v. Read* (1883), 93 N. Y. 474. Generally a corporation need not allege or prove its incorporation where its want of capacity to sue has not been raised by demurrer or answer. *Young Men's Christian Assn. v. Dubach*, 82 Mo. 475.

<sup>28</sup> *Schloss v. Montgomery Trade Co.* (1888), 87 Ala. 411, 13 Am. St. Rep. 51.

<sup>29</sup> *Miami Powder Co. v. Hotchkiss*, 17 Ill. App. 622

very generally worded, the user may be entirely in another State than the parent State, if the office is located in the latter, and returns are made, as provided, to its Secretary of State.<sup>31</sup> If a defendant would deny, in its answer, the fact of incorporation, the denial must be explicit, in order to put plaintiff to proof.<sup>32</sup> In an action against a corporation, for a balance due on a contract for sale of lumber, where it admits the purchase, it can not allege that it did not make the contract, because it was not organized as a corporation when the contract was executed.<sup>33</sup> And, where a corporation had issued a certificate of insurance, sealed with its seal, and signed by its president and secretary, it was estopped by its own deed, to introduce evidence showing that, at the time, it was not fully organized.<sup>34</sup> So, also, an answer, showing the use of a corporate name, the exercise of corporate franchises, and that the plaintiff was an officer of the company, and had obtained judgment against it, sufficiently shows the existence of the corporation.<sup>35</sup> But a body, sued as a corporation, is not estopped from denying its corporate existence, by reason of having done acts which might have been done equally well by an unincorporated body.<sup>36</sup> In a suit, for a benefit fund, against an association which averred that it was unincorporated, it has been held that testimony, that the association was a corporation *de facto*, was not error, although superfluous.<sup>37</sup> If a corporation sues, and its corporate existence is denied, the denial may be pleaded in bar as well as in abatement.<sup>38</sup> But an answer, under oath, that "plaintiff had not complied with the provisions of" a certain act, is not sufficiently certain for a plea in abatement, and is bad in bar, for stating only conclusions.<sup>39</sup>

*The plea not raised by demurrer.*—A corporation's legal existence, and capacity to sue, can not be raised on demurrer.<sup>40</sup>

<sup>31</sup> Moxie, etc. Co. v. Baumbach (1887), 32 Fed. Rep. 205, construing Me. Rev. Stat., ch. 48, § 16.

<sup>32</sup> Bengston v. Thingvalla S. S. Co., 31 Hun, 96.

<sup>33</sup> Williams v. Stevens Point Lumber Co. (1888), 72 Wis. 487.

<sup>34</sup> Independent Order v. Paine (1887), 122 Ill. 625.

<sup>35</sup> Johnson v. Gibson, 78 Ind. 282.

<sup>36</sup> Kirkpatrick v. Keota United Presbyterian Church, 63 Iowa, 372.

<sup>37</sup> Jewell v. Grand Lodge (1889),

41 Minn 405; St. Anthony, etc. Co. v. King Bridge Co., 23 Minn. 186; East Norway Lake Church v. Froislie, 37 Minn 447.

<sup>38</sup> Oregonian Ry. Co. v. Oregon Ry. & Nav. Co., 22 Fed. Rep. 245, 23 Fed. Rep. 232.

<sup>39</sup> Singer Manuf. Co. v. Effinger, 79 Ind. 264.

<sup>40</sup> Irving Bank v. Corbett, 10 Abb. N. Cas. 85; Stanley v. Richmond & D. R. Co., 89 N. C. 331; Crane, etc. Manuf. Co. v. Reed, 3 Utah, 506.

If corporate capacity is disputed, it should be by answer.<sup>41</sup> And a failure of the complaint, to allege that the plaintiff, designated as a national bank, is a corporation, as required by statute, is not a failure to state facts constituting a cause of action; and, even if it fails to show legal capacity to sue; objection must be taken by answer, and not by demurrer.<sup>42</sup> But failure to allege in a complaint that a party is a corporation, as required by statute, is ground for demurral.<sup>43</sup> Failure, however, of the complaint to allege compliance, with a statute which provides that no corporation shall maintain or defend any action in relation to its property, until it has filed a copy of its articles of incorporation with the clerk of the county in which the property is situate, does not render it demurrable, where it contains no averment on the subject; the defense must be specially pleaded.<sup>44</sup>

*Not raised by the general issue.*—An allegation in the complaint that defendant is a corporation, is not put in issue by a general denial;<sup>45</sup> although some older cases hold that a corporation suing, must prove its incorporation under the general issue.<sup>46</sup> And the corporate existence of a plaintiff corporation, is not in issue, under an answer which denies the plaintiff's allegations generally, on information and belief.<sup>47</sup> Where an answer simply alleges that the defendant has no knowledge or information sufficient to form

<sup>41</sup> Stanley v. Richmond, etc. R. Co., 89 N. C. 331.

<sup>42</sup> Irving Bank v. Corbett, 10 Abb. N. Cas. 85, construing N. Y. Code Civ. Proc., §§ 1775, 488, subd. 8.

<sup>43</sup> Oesterreicher v. Sporting Times Pub. Co. (1889), 5 N. Y. Supp. 2.

<sup>44</sup> South Yuba, etc. Co. v. Rosa (1889), 80 Cal. 333, construing Cal. Civ. Code, § 299.

<sup>45</sup> Rembert v. South Carolina Ry. Co. (S. C. 1888), 9 S. E. Rep. 968. Where a corporation sues in a federal court it need not prove its corporate existence where defendant has pleaded the general issue only. Union Cement Co. v. Noble, 15 Fed. Rep. 502. So in the state courts' allegations in an answer, that the plaintiff never was a corporation duly or otherwise organized under the laws of this state, nor a copartner-

nership nor an individual, do not raise that issue. Ontario State Bank v. Tibbits (1889), 80 Cal. 68. And again it has been held that pleading the general issue admits the corporate existence. Harrison v. Martinsville, etc. R. Co., 16 Ind. 506, 79 Am. Dec. 447. Cf. Commercial Bank v. Pfeiffer, 108 N. Y. 242; Orono v. Wedgewood, 44 Me. 49, 69 Am. Dec. 81; West Winsted Assn. v. Ford, 27 Conn. 282, 71 Am. Dec. 447.

<sup>46</sup> Welland Canal Co. v. Hathaway, 8 Wend. 480, 24 Am. Dec. 51; Selma, etc. R. Co. v. Tipton, 5 Ala. 789, 39 Am. Dec. 344; Harris v. Muskingum Manuf. Co., 4 Blackf. 267, 39 Am. Dec. 372; Phenix Bank v. Curtis, 14 Conn. 437, 36 Am. Dec. 492.

<sup>47</sup> Liberian Exodus Jointstock Steam Ship Co. v. Rodgers, 21 S. C. 27.

a belief, as to whether the plaintiff is a corporation under a certain law, as alleged, this is not enough to put the corporation upon proof of its corporate existence, for the language has no greater force than a general denial, and is not tantamount to an affirmative allegation, that the plaintiff is not a corporation as required by the law.<sup>48</sup>

*Not to be raised after verdict.*—A corporation, bringing suit in a justice's court, is not, upon an appeal, bound to prove its corporate existence, if no objection was made, by the defendant, to its failure to do so, on the trial in the court below.<sup>49</sup> So, also, if an action is brought against a defendant by the name of the Waycross Lumber Company, and service is made on a party as president thereof, who files pleas to the declaration, an objection taken after verdict, for the first time, that the declaration did not allege that the defendant was a corporation, is not available.<sup>50</sup> Unless pleaded, the defense of *ultra vires* can not be taken advantage of.<sup>51</sup>

§ 1005. (a) A "company" is *prima facie* a corporation.—The word "company" imports a corporation.<sup>52</sup> In a suit against C. Perkins & Co., the defendant is presumed to be a corporation.<sup>53</sup> A patent by the United States for land to a company as a corporation is *prima facie* proof of its corporate existence sufficient to admit in evidence for plaintiff a deed of conveyance (of the land) executed by the company as a corporation, and the patent, as part of plaintiff chain of title.<sup>54</sup> Where a party sues and obtains judgment, under a name such as would imply that it is a corporation, but without alleging the fact of its incorporation, the judgment will be sustained.<sup>55</sup> Thus a plaintiff sued under the name of the "Johnston Harvester Company," upon a contract made under that name with the defendant, who interposed no defense in his answer, except a denial of the execution of the contract, and it was held

<sup>48</sup> Concordia, etc. Assn. v. Read (1883), 93 N. Y. 474; Rock Island Bank v. Loyhed (1881), 28 Minn. 396.

<sup>49</sup> State v. New York, etc. Co. (N. J. 1887), 8 Atl. Rep. 290.

<sup>50</sup> Cribb v. Waycross Lumber Co. (1889), 82 Ga. 597.

<sup>51</sup> Business Men's, etc. Assn. v. Berlan (Iowa, 1904), 98 N. W. 766.

<sup>52</sup> Holcombe v. Cable Co. (Ga.

1904), 46 S. E. 671; United Brotherhood, etc. v. Dinkle (Ind. App. 1904), 69 N. E. 707.

<sup>53</sup> Perkins v. Murphy (Ga. 1904), 46 S. E. 832.

<sup>54</sup> Altscomb v. Casey (Oreg. 1904), 76 Pac. 1083; Galbraith v. Shasta Iron Co. (Cal. 1904), 76 Pac. 901.

<sup>55</sup> St. Cecilia Academy v. Hardin (1887), 78 Ga. 39.

that no proof of incorporation was necessary, and that the justice's judgment should not be set aside for want of that proof.<sup>56</sup> Furthermore, under laws making trustees of the Methodist Church a body corporate, and nothing appearing to the contrary, plaintiffs, who sue in their individual names as trustees of the Barstow-Street Methodist Episcopal Church, are presumed to have been lawfully incorporated.<sup>57</sup> But it has been held that, where individuals sued by their own names, "as trustees of the Printing Establishment of the United Brethren in Christ," which was averred to be a corporation, the individuals, and not the corporation, were the real plaintiffs.<sup>58</sup> It should generally be left to the court as a matter of law, to determine whether or not the name in which a party sues is such as to imply its incorporation.<sup>59</sup>

*Incorporation need not be alleged.* In bringing suit the corporation need not allege incorporation.<sup>60</sup> Proof of filing certificate of incorporation in the county clerk's office is sufficient proof of incorporation without proof of filing in office of secretary of state.<sup>61</sup> Its regular incorporation is presumed by execution and delivery of an instrument to the corporation.<sup>62</sup> It is unnecessary to allege its incorporation in an indictment against the company.<sup>63</sup> It is not necessary to allege it in suit, on a promissory note of the corporation.<sup>64</sup> It should be alleged in a libel in admiralty.<sup>65</sup> A general denial does not put in issue the fact of incorporation.<sup>66</sup> Denial on information and belief puts the fact in issue.<sup>67</sup> Proof of a *de facto* corporation is sufficient to meet the plea of *nul tiel* corporation.<sup>68</sup>

<sup>56</sup> Johnston Harvester Co. v. Clark, 30 Minn. 308.

<sup>57</sup> Skinner v. Richardson (1890), 76 Wis. 464.

<sup>58</sup> Rike v. Floyd (1890), 42 Fed. Rep. 247.

<sup>59</sup> St. Cecilia Academy v. Hardin (1887), 78 Ga. 39.

<sup>60</sup> Brady v. National, etc. Co. (1901), 64 Ohio St. 267, 83 Am. St. Rep. 853; Holden v. Great Western, etc. Co. (1897), 69 Minn. 527, 65 Am. St. Rep. 585; State v. Dry Fork R. R. (1901), 50 W. Va. 235, 40 S. E. 447.

<sup>61</sup> Georgeson v. Caffery (1893), 71 Hun, 472.

<sup>62</sup> West Side, etc. Co. v. Conn. etc. Co. (1900), 186 Ill. 156; Loan, etc. Co. v. Stoddard (Neb. 1902),

89 N. W. 301; Exchange Nat. Bank v. Capps (1891), 32 Neb. 242, 29 Am. St. Rep. 433; Leader v. Lowry (1899), 9 Okla. 89, 59 Pac. 242.

<sup>63</sup> State v. Dry Fork R. R. (1901), 50 W. Va. 235, 40 S. E. 447.

<sup>64</sup> Griffin v. Asheville, etc. Co. (1892), 111 N. C. 434, 16 S. E. 423.

<sup>65</sup> Sun National Ins. Co. v. Mississippi, etc. Co. (1882), 14 Fed. 699.

<sup>66</sup> Chamberlain, etc. v. Kemper, etc. Co. (Neb. 1902), 92 N. W. 172.

<sup>67</sup> Mich. Ins. Bank v. Eldred (1892), 143 U. S. 293.

<sup>68</sup> Cozzens v. Chicago, etc. Co. (1897), 166 Ill. 213.

**§ 1006 (b) Estoppel to deny corporate existence.**—In the absence of fraud, it is held contrary to equity to allow one who has entered into a contract with persons, as a corporation, to repudiate his obligation under the contract after he has received its benefits, by denying that such persons are a corporation.<sup>69</sup>

Thus a purchaser of property from a corporation, giving his note and mortgage, can not defeat recovery on the note or foreclosure of the mortgage by denying the corporate existence.<sup>70</sup> Estoppel to deny corporate existence operates not only against members and officers individually, but also against the pretended corporation itself. Persons assuming to act as a corporation, and having entered into a contract as such, and received its benefits, can not afterward deny their existence as a corporation, in any action against them, as a corporation, to enforce the contract.<sup>71</sup> Stockholders may be estopped as against creditors, as well as against the corporation itself, to attack its legal existence, for the purpose of escaping liability on subscriptions.<sup>72</sup> Persons who were elected directors of a corporation, acted as such, and employed plaintiff to survey the right of way, were estopped to deny incorporation, in defense of plaintiff's suit to enforce their liability as stockholders. Such existence means existence *de facto*, and not corporate existence *de jure*. Where there is no defect of power to incorporate, mere irregularities in incorporation can not be shown collaterally.<sup>73</sup> A *de facto* corporation, that by regularity of organization might be one *de jure*, can sue and be sued. The doctrine of estoppel to deny corporate existence, relates to *de facto* corporations, and goes to the mere *de facto* organization, and not to the question of legal authority to make the organization.<sup>74</sup> A person who contracts with a *de facto* corporation, thereby recognizes its corporate existence, and can not, in an action against him on the contract, impeach the legality of its organization.<sup>75</sup> Accordingly, where the defendant gave a note to the plaintiff in its corporate capacity, it was held that he had admitted that it

<sup>69</sup> *Casey v. Galli*, 94 U. S., 673; *Smith v. Sheeley*, 12 Wall. 358.

Co. (1861), 16 Ind. 275, 79 Am. Dec. 430.

<sup>70</sup> *Exchange Nat. Bank v. Capps*, 32 Neb. 242, 29 Am. St. Rep. 433.

<sup>75</sup> *Butchers' & Drovers' Bank v. McDonald*, 130 Mass. 264; *Cravens v. Eagle, etc. Co.* (1889), 120 Ind. 6; *Smelser v. Mayne, etc. Co.*, 82 Ind. 417; *McCord, etc. Co. v. Glen* (1889), 6 Utah, 139, 21 Pac. Rep. 500; *Beekman v. New York, etc. Co.*, 35 Fed. Rep. 3.

<sup>71</sup> *Phinizy v. Augusta, etc. Co.*, 62 Fed. 678.

<sup>72</sup> *Sanger v. Upton*, 91 U. S. 56.

<sup>73</sup> *Tanne v. Nichols* (Ky. 1904), 80 S. W. 225.

<sup>74</sup> *Heaston v. Cincinnati R. R.*

was a duly instituted corporation.<sup>76</sup> And one who has signed the certificate of incorporation, has conveyed property to the company, and has acted as one of its officers, is estopped from denying its *de facto* existence.<sup>77</sup> The corporate character and existence of a plaintiff, in an action, may even be established by proof that a defendant had contracted with it as such, having recognized the existence of a legal entity with a corporate name, and having capacity to contract.<sup>78</sup> Where an effort has been made, in good faith, to organize a corporation under a statute, and all formalities are complied with, except the filing of the certificate of incorporation with the Secretary of State, and corporate functions are assumed, there is a corporation *de facto*, and persons dealing with it, as such, can not allege that it is not so *de jure*, nor hold the incorporators liable as partners. For the recording of the certificate is not a condition precedent to the legal existence of the corporation.<sup>79</sup> So, under a statute which enacts that no person sued, on a contract made with a corporation, shall set up in defense, want of legal organization, it was held that heirs petitioning to set aside a bequest, can not allege illegal organization against a corporation seeking to maintain the validity of the bequest.<sup>80</sup> Again, a party who has recognized an association claiming to be a corporation, by dealing and contracting with it, will be deemed to have admitted its legal existence, in an action on contracts made upon the faith of the transactions. And where an association, or corporation, and another have assumed to enter into a partnership, and have done business jointly, they may recover, upon obligations made to them in their partnership name, irrespective of their rights and duties, as between themselves, or the power of the association to execute the powers incident to a partnership.<sup>81</sup>

**§ 1006a. Defense of ultra vires. Statute of limitations. Laches not imputable to the State.**—When the effect would be to accomplish a "legal wrong," the plea of *ultra vires* will not prevail, whether raised by, or against, the corporation.<sup>81a</sup> The

<sup>76</sup> Studebaker Bros. Manuf. Co. v. Montgomery, 74 Mo. 101.

<sup>77</sup> Bates v. Wilson (1890), 14 Colo. 740, 24 Pac. Rep. 99.

<sup>78</sup> French v. Donohue, 29 Minn. 111; Johnston Harvester Co. v. Clark, 30 Minn. 308; Holbrook v. St. Paul, etc. Co., 25 Minn. 229.

<sup>79</sup> Vanneman v. Young (1890), 52 N. J. 403.

<sup>80</sup> Quinn v. Shields, 62 Iowa, 129, construing Iowa Code, § 1089.

<sup>81</sup> French v. Donohue, 29 Minn. 111. *Vide supra*; ESTOPPEL TO DENY CORPORATE EXISTENCE, §§ 79b, 79c, 125, 626.

<sup>81a</sup> *In re Waterloo, etc. Co.* (N. Y. 1904), 128 Fed. Rep. 517 (U. S. D. C.).

principle, that a corporation can not plead *ultra vires* to its contract, and at the same time retain the benefits derived from the contract, does not apply to a contract, illegal because prohibited by statute, or because contrary to public policy.<sup>82</sup> A corporation can not be estopped to plead *ultra vires* as a defense.<sup>83</sup> An insurance company, which *ultra vires* assumed the policies of another insurance company, without knowing that there was a charge on them for a dollar a thousand, payable to the agent who wrote the policies, but agreed to pay the charges, and collected the renewals, including those charges,—*held*, that it could not retain the renewals and plead *ultra vires* against the agent's claim for an accounting.<sup>84</sup> A creditor of the corporation was induced, by its president, to surrender the note of the corporation, for money he had loaned to it, and instead to accept corporate stock, with written guaranty of six per cent. annual dividend. After paying it for awhile, further payment was refused, on the ground that the corporation had no authority to agree to pay dividends, except from profits. *Held*, that the creditor might rescind the agreement, notwithstanding it was *ultra vires*; and that the corporation could not retain its note, and compel the plaintiff to retain his stock to his prejudice and loss.<sup>85</sup> A corporation, owning suburban property, agreed to promote street-car travel to the location of the property, and the city having built the bridge, the corporation was held estopped to plead that its contract was *ultra vires*.<sup>86</sup> Assignees of stockholders can not plead *ultra vires*, to the corporate acts authorized by the stockholders, and completed, before the assignment, or where the completion is required for protection of the rights of third persons.<sup>87</sup>

*Statute of limitations.*—Limitations commence to run, in favor of a stockholder against a statutory action, from the time when the debt against the corporation falls due.<sup>88</sup>

*Laches not imputable to the State.*—Restraint by the State, of usurpation of power by a corporation, can not be defeated, on the

<sup>82</sup> Chicago, etc. Co. v. Southern, etc. Ry. Co. (Ind. App. 1904), 70 N. E. 843.

<sup>83</sup> Metropolitan, etc. v. Lyndonville, etc. (Vt. 1904), 57 Atl. 10.

<sup>84</sup> Schrinplin v. Farmers' etc. Assn. (Iowa, 1904), 98 N. W. 613.

<sup>85</sup> McVity v. E. D. Albro Co. (1904), 86 N. Y. S. 144, 90 App. Div. 109.

<sup>86</sup> Board of Trustees v. Pied-

mont, etc. Co. (N. C. 1903), 46 S. E. 723.

<sup>87</sup> McCampbell v. Fountain Head. R. Co. (Tenn. 1903), 77 S. W. 1070.

<sup>88</sup> Parmelee v. Price (1903), 70 N. E. 725, 208 Ill. 544. *Vide, ultra vires AS DEFENSE, supra, §§ 334, 644, 896-898, and see 48 L. R. A. 637.*

ground of laches, or acquiescence, by delay to invoke action by the courts.<sup>99</sup>

**§ 1007. Evidence. Proof of corporate existence.**—A city having granted franchises to a telephone company, incorporated under general laws of the State, and carrying on its business, is estopped to deny its corporate existence, in its suit to enjoin the city from interference with the privileges it has granted.<sup>100</sup> A purchaser of property from a corporation, is estopped to deny its corporate existence.<sup>101</sup> Proof of corporate existence may be by oral testimony.<sup>102</sup> A statute making certified copies of certain instruments, *prima facie* evidence of the facts therein stated, do not exclude other proof of the existence of a corporation. Proof of its *de facto* existence, under the name alleged, is admissible.<sup>103</sup>

**§ 1008. (a) Evidence of corporate existence, by certificates or copies.**—The original record of incorporation is admissible to prove the fact of incorporation, also the letters of incorporation,<sup>104</sup> and a copy of the articles of association of a corporation, filed in the county recorder's office, when officially certified to as a full, true, and complete copy from the record,—is admissible as evidence of the original articles which have been lost.<sup>105</sup> A copy of the organization certificate of a bank, certified and sealed by the comptroller of the currency, is sufficient evidence of the corporate existence of the bank.<sup>106</sup> But a paper lacking three or four of the essentials declared by statute necessary to serve as proof of corporate organization,—can not be received in proof thereof.<sup>107</sup> Where, at the trial, the admission of articles of incorporation is objected to, as immaterial, irrelevant, and incompetent evidence, the specific objection, on appeal that the articles were not sufficiently authenticated to render them admissible, and that the certificates were made by deputy officers, will not be considered.<sup>108</sup> Certificate of incorporation, under the laws of another State is

<sup>99</sup> People v. Pullman, etc. Co. (1898), 175 Ill. 125, 64 L. R. A. 366. *Vide supra*, §§ 574, 642, LACHES.

<sup>100</sup> Old Colony, etc. Co. v. City of Wichita (1903), 123 Fed. 762.

<sup>101</sup> Raphael Weill & Co. v. Critenden (Kan. 1903), 73 Pac. 238.

<sup>102</sup> State v. Pittam (Wash. 1903), 73 Pac. 1042.

<sup>103</sup> State v. Pittam (Wash. 1903), 72 Pac. 1042. *Vide* Presumption

of Corporate Existence, 22 L. R. A. 226.

<sup>104</sup> State v. Abernathy, 94 N. C. 545.

<sup>105</sup> Walker v. Shelbyville, etc. Turnpike Co., 80 Ind. 452.

<sup>106</sup> Rock Island Bank v. Loyhed, 28 Minn. 396.

<sup>107</sup> Baptist Church v. Baltimore, etc. R. Co., 4 Mackey (D. C.) 43.

<sup>108</sup> Noonan v. Caledonia Gold Min. Co. (1887), 121 U. S. 393.

insufficient proof, without also a copy of the laws under which incorporated.<sup>99</sup> Evidence by admissions or declarations, by the stockholders, or of the corporation, do not bind each other, merely because of their relations as corporation and stockholder, or as between the stockholders themselves.<sup>1</sup>

**§ 1009. (b) Evidence of incorporation, by performance of corporate acts, or admissions.**—Generally “it may be safely relied on as a sound proposition, that, when an association of persons have for a long time acted as a private corporation, have been uniformly recognized as such, and rights have been acquired under them as a corporation, the law will countenance every presumption in favor of their legal corporate existence, at least, unless against the sovereign.”<sup>2</sup> The execution of a note and deed to a corporation, is *prima facie* proof of the existence of the corporation, by way of estoppel to deny it.<sup>3</sup> Where it appears that plaintiff was recognized in the community as a corporation, its records show that it was acting as such, and in all its dealings was so styled; that it had held corporate meetings, and pursued corporate forms of action,—sufficient is shown to bring it within a statute, which declares that the due incorporation of any company, claiming in good faith to be a corporation, and doing business as such, shall not be inquired into collaterally in any private suit to which such *de facto* corporation may be a party.<sup>4</sup> But, if the acts of a company or association, however long its standing, are such only as

<sup>99</sup> Law, etc. Soc. v. Hoyne, 37 Oreg. 544 (1900); Nashua, etc. Bank v. Anglo-American, etc., 189 U. S. 221 (1903); Anglo-American, etc. Co. v. Dyer (Mass. 1902), 64 N. E. 416; United States, etc. Co. v. McClure (Oreg. 1902), 70 Pac. 543.

<sup>1</sup> American, etc. Co. v. Phoenix, etc. Co. (1902), 113 Fed. Rep. 629; Wilgus v. Germain (1896), 72 Fed. Rep. 773; Simmons v. Sisson (1863), 26 N. Y. 264; Chattanooga, etc. R. R. v. Liddell (1890), 85 Ga. 482, 21 Am. St. Rep. 169; Trusdell v. Chumár (1894), 75 Hun, 416; Hardwick, etc. Co. v. Dreenan (1900), 72 Vt. 438; Stanton v. Baird, etc. Co. (Ala. 1902), 32 So. 299; Bullock v. Consumers' Lumber Co. (Cal. 1892), 31 Pac. 367; Cosgray v. New England, etc.

Co. (1897), 22 N. Y. App. Div. 455; Louisville v. Stewart (1893), 56 Fed. 808; Sullivan v. Louisville, etc. R. R. (1901), 128 Ala. 77, 30 So. 528; Florida, etc. Co. v. Usina. (1900), 111 Ga. 697, 36 S. E. 928; Browning v. Hinckell (1892), 48 Minn. 544, 31 Am. St. Rep. 691.

<sup>2</sup> Angell & Ames on Corp. (11th ed.), § 70, citing Hagerstown Turnpike v. Creeger, 5 Harris & J. 122; Shrewsbury v. Hart, 1 Car. & P. 113; Dillingham v. Snow, 7 Mass. 547; Stockbridge v. West Stockbridge, 12 Mass. 400; Bow v. Allenstown, 34 N. H. 351.

<sup>3</sup> Brown v. Scottish American Mortgage Co., 110 Ill. 235.

<sup>4</sup> Lakeside Ditch Co. v. Crane (1889), 80 Cal. 181, construing Cal. Civ. Code, § 358.

might be performed by an unincorporated company, corporate existence will not be presumed therefrom.<sup>5</sup> Thus, the fact that the business of a company is conducted by a president and secretary, raises no presumption of incorporation.<sup>6</sup>

**§ 1010. (c) Evidence by production of corporate books.**—The law as to the production of corporate books as evidence, does not appear to be well settled. It has been said, however, in a case to which the corporation was not a party, that "No authority is found in any of the federal courts, denying the right to compel corporations to produce evidence which may be necessary and vital to the rights of the litigants. On principle, it is impossible to suggest any reason why a corporation should be privileged to withhold evidence which an individual would be required to produce. It may be inconvenient and sometimes embarrassing to the managers of a corporation, to require its books and papers to be taken from its office, and exhibited to third persons, but it is also inconvenient, and often onerous to individuals, to require them to do the same thing. Considerations of inconvenience must give way to the paramount right of litigants, to resort to evidence, which may be in the power of witnesses to produce, and without which grave interests might be jeopardized, and the administration of justice thwarted."<sup>7</sup> And a motion by a depositor for an order, compelling a defendant bank to permit an inspection of its books, was allowed, where it was made to appear that the plaintiff could not obtain the information sought otherwise than by inspection.<sup>8</sup> But, usually, a corporation can not be compelled to produce its books when it is not a party to the suit.<sup>9</sup> The New York Code

<sup>5</sup> Greene v. Dennis, 6 Conn. 302; Ernst v. Bartle, 1 Johns. Cas. 319.

<sup>6</sup> Clark v. Jones, 87 Ala. 474.

<sup>7</sup> Wallace, J., in Wertheim v. Continental Ry. & Trust Co., 15 Fed. Rep. 716.

<sup>8</sup> Justice v. Bank, 83 N. C. 8. So, also, it has been held under the Companies Clauses Consolidation Act, 1845, that a party who had recovered judgment against a corporation was not precluded from issuing execution against the shareholders who had not paid for their shares, although lands of the company have been delivered in eilegit, if the proceeds of the lands be insufficient

to satisfy the debt. And that, therefore, a *mandamus* should issue commanding the company to give the creditor inspection of the register of shareholders. Queen v. Derbyshire, etc. Ry. Co., 3 El. & Bl. 784.

<sup>9</sup> La Farge v. La Farge Ins. Co., 14 How. Pr. 26; Morgan v. Morgan, 16 Abb. Pr. (N. S.) 291; Bank of Utica v. Hilliard, 5 Cow. 419. For, it is said: "Where a corporation is not a party to the action, no power of enforcing an examination or production of its books and papers is afforded on a trial between other parties. Nor can its agents or officers, in their

of Procedure, however, provides that "the production upon a trial, of a book, or paper, belonging to, or under the control of a corporation a party to the suit, may be compelled, in like manner, as if it was in the hands or under the control of a natural person. For that purpose a *subpæna duces tecum*, or an order made as prescribed in the code, as the case requires, must be directed to the president or other head of the corporation, or to the officer thereof, in whose custody the book or paper is."<sup>10</sup> But this does not authorize an order in the nature of a *subpæna duces tecum* to the directors of a defendant corporation. They are not "parties."<sup>11</sup> A clerk of a bank can not be compelled to produce the books of the bank,—because he is a mere servant of the corporation, and the books are not in his possession, or under his control.<sup>12</sup> And a court refused to grant an attachment against a secretary and solicitor of a railway company, on the ground that he was nothing more than the servant of the directors, and, as such, had no authority to produce the books.<sup>13</sup> The books of the corporation may be admitted in evidence of illegal conversion of corporate funds by directors.<sup>14</sup>

**§ 1011. (d) Admissibility of evidence. Competency of witnesses.**—By reason of his interest, a stockholder at common law, is an incompetent witness for the corporation.<sup>15</sup> The secretary is not an interested witness, in a suit wherein the corporation is plaintiff.<sup>16</sup> A bank officer, who was present at the time of a deposit by a person, since deceased, may testify in a suit concerning it, he having sold his stock, and ceased business connection with the bank.<sup>17</sup> A stockholder is incompetent to act as

individual capacities, be compelled to produce the books of the corporation over which they have no absolute control." And, "even in a case of an action, in which a corporation is a party, the production of its books cannot be enforced by *subpæna duces tecum* served on its officers, that can only be effected by way of discovery under the provisions of the revised statutes." *Morgan v. Morgan*, 16 Abb. Pr. (N. S.) 291.

<sup>10</sup> N. Y. Code Civ. Proc., § 868.

<sup>11</sup> *Boorman v. Atlantic, etc. Ry. Co.*, 17 Hun, 555.

<sup>12</sup> *Bank of Utica v. Hilliard*, 5 Cow. 133.

<sup>13</sup> *Crowther v. Appleby*, L. R. 9 C. P. 27.

<sup>14</sup> *Saranac, etc. R. R. v. Arnold* (1901), 167 N. Y. 368. *Vide supra*, §§ 111-117, PRODUCTION OF CORPORATE BOOKS AND RECORDS. *Vide infra*, § 1356, INTERSTATE AND FOREIGN CORPORATIONS.

<sup>15</sup> *Mitchell v. Beckman*, 64 Cal. 117 (1883).

<sup>16</sup> *University, etc. v. Emmert* (1899), 108 Iowa, 500.

<sup>17</sup> *Tecumseh, etc. Bank v. McGee* (1901), 61 Neb. 709, 85 N. W. 949.

judge, in a suit to which the corporation is a party.<sup>18</sup> Where a commissioner, appointed by the court to sell the property of a company, sold it to a corporation in which he was stockholder and director, it was by reason of his interest set aside.<sup>19</sup> A shareholder's right in the corporation is to participate in the management, and in the surplus profits, whenever divided, and upon its dissolution, to share in the assets remaining after payment of its debts.<sup>20</sup>

*Privilege of witness.*—Under an act providing for examination of witnesses as to violation of the anti-trust law, and providing that they shall not be prosecuted for any such violation, about which they may so testify, a witness can not refuse to testify, on the ground that the immunity afforded by the act, does not protect him against the possibility of using his testimony as evidence against him in a prosecution for violation of the anti-trust law.<sup>21</sup>

**§ 1012. Sequestration of corporate property. Contempt of court.**—A corporation may confess judgment.<sup>22</sup> An injunction against a corporation, binds all its officers and agents, although they are not parties<sup>23</sup> and for its disobedience, they are liable to fine for contempt of court. Sequestration of its corporate property is a proper remedy to enforce a decree against the corporation, and to payment of fine for contempt of court.<sup>24</sup> Sequestration is the chancery remedy for enforcement of its orders and decrees, by taking and holding property till its rents and profits satisfy the decree. It is analogous to common-law execution.<sup>25</sup> The directors may compromise suit beyond the power of the stockholders to interpose.<sup>26</sup> Where the receiver, under order of court, compromised with directors, in settlement of claims

<sup>18</sup> Buena Vista, etc. Bank v. Grier (1901), 114 Ga. 398, 40 S. E. 284; Adams v. Minor (1898), 121 Cal. 372.

<sup>19</sup> McCullough, etc. Co. v. National Bank, etc. (1900), 111 Ga. 132.

<sup>20</sup> State v. Mitchell (1899), 104 Tenn. 336, 58 S. W. 365, 36 S. E. 465; Hall v. Henderson (1899), 126 Ala. 449, 85 Am. St. Rep. 53; Gibbons v. Mahon (1890), 136 U. S. 549.

<sup>21</sup> State v. Jack (Kan. 1904), 76 Pac. 911.

<sup>22</sup> Solomon v. Schneider & Co.

(1898), 56 Neb. 680, 77 N. W. 65.  
<sup>23</sup> Sidway v. Missouri, etc. Co. (1902), 116 Fed. 381.

<sup>24</sup> *Vide infra*, CONTEMPT OF COURT, § 1028; Reid v. Northwestern R. R. Co. (1857), 32 Pa. St. 257.

<sup>25</sup> Reid v. Northwestern R. R. Co. (1857), 32 Pa. St. 257; Jones v. Boston Mill Corp. (1827), 21 Mass. 507, 15 Am. Dec. 358.

<sup>26</sup> Donohoe v. Mariposa, etc. Co. (1885), 66 Cal. 317. 5 Pac. 495; Chambers v. Chambers, etc. Co. (1898), 185 Pa. St. 105

against them for breach of trust, a stockholder can not sustain a suit for such breach.<sup>27</sup> Judgment of sequestration does not dissolve the corporation.<sup>28</sup> A stockholder can not have an *ultra vires* sale set aside, except upon return by the corporation, of the money or property it received as the consideration.<sup>29</sup>

**§ 1013. Judgment a bar to similar suit. Contribution among directors.**—Judgment in one stockholder's suit constitutes a bar to similar suit by another stockholder, and whether begun before, or after, the judgment.<sup>30</sup> Judgment, in a suit brought in another State by the corporation, in which it was defeated, will bar any stockholder's suit, on behalf of the corporation on the same cause of action.<sup>31</sup> Directors can have no contribution, where compelled, by judgment, to repay money received for illegally transferring the company's property to another corporation.<sup>32</sup>

**§ 1014. Execution and attachment upon the property of the corporation.**—The necessity to the public that the regular service of a railroad, or other *quasi*-public corporation, shall not be interfered with, will not allow it, or any of its property necessary to such service, to be taken in any part in levy of execution, or to be sold, in the absence of express legislative authority. The judgment creditors' remedy is in equity, for appointment of a receiver,<sup>33</sup> and a sequestration of the company's earnings.<sup>34</sup> Land acquired by a railroad, or other corporation, owing special duties to the public, can not be sold on execution, apart from the corporate franchises, so as to give title to the property, free from the duties assumed by the corporation.<sup>35</sup> This exemption does not

<sup>27</sup> Craig v. James (1902), 71 N. Y. App. Div. 238. (1894); Smith v. Bulkley (Colo. 1902), 70 Pac. 958.

<sup>28</sup> Proctor v. Sidney, etc. Co., 8 N. Y. App. Div. 42 (1896).

<sup>29</sup> Fleckenstein v. Waters, 160 Mo. 649 (1901); Jones v. Green, 88 N. W. 1047 (Mich. 1901); Hayward v. Leeson (1900), 176 Mass. 310. 49 L. R. A. 725; Mobile, etc. Co. v. Gass (1901), 129 Ala. 214, 29 So. 920; Hitchcock v. Barrett (1892), 50 Fed. 653.

<sup>30</sup> Willoughby v. Chicago, etc. Co. (1892), 50 N. J. Eq. 656; Montezuma, etc. Co. v. Dake (Colo. 1901), 63 Pac. 1058.

<sup>31</sup> Alexander v. Donohue, 68 Hun, 131 (1893), 143 N. Y. 2031

<sup>32</sup> Gilbert v. Finch (1903), 173 N. Y. 455.

<sup>33</sup> Connor v. Tennessee, etc. Ry. Co. (1901), 109 Fed. Rep. 931; George v. St. Louis, etc. Ry. Co. (1890), 44 Fed. Rep. 117; East Alabama v. Doe (1885), 114 U. S. 340; Central Trust Co. v. Moran (1894), 56 Minn. 188, 29 L. R. A. 212; Lake Shore, etc. Ry. Co. v. Grand Rapids (1894), 102 Mich. 374, 29 L. R. A. 195.

<sup>34</sup> Gardner v. Mobile, etc. R. R. Co., 102 Ala. 635, 48 Am. St. Rep. 84.

<sup>35</sup> Rutland Ry. Co. v. Chaffee, 72

apply to the property of purely private corporations, nor to the property of a *quasi*-public corporation, not in use by it, or necessary to the performance of its duties to the public.<sup>36</sup> Unless authorized by statute, the corporate creditors can not reach, by execution or attachment, the franchises or property of a *quasi*-public corporation, requisite to the performance of its duties to the public, and it is not material how the property was acquired, whether by purchase, donation, or under condemnation proceedings.<sup>37</sup> The national banking act prohibits any attachment against a national bank or its property, before a final judgment.<sup>38</sup> Where the statute authorizes the sale of the property or franchises of a corporation, in satisfaction of judgment, the mode pointed out by the statute, must be followed.<sup>39</sup>

Vt. 404; *Gooch v. McGee*, 83 N. C. 59.

<sup>36</sup> *Plymouth R. Co. v. Colwell*, 39 Pa. St. 337, 80 Am. Dec. 526.

<sup>37</sup> *Doe v. Fischer*, 114 U. S. 340.

<sup>38</sup> *Dennis v. First Nat. Bank, etc.*, 127 Cal. 453, and cases cited.

<sup>39</sup> *James v. Pontiac, etc. Co.*, 8 Mich. 91. *Vide supra*, EXECUTION AND ATTACHMENT, §§ 651-662a, and *infra*, § 1064.

## CHAPTER XL.

### CRIMES AND CRIMINAL PROSECUTIONS.

<p>§ 1015. Liability of corporation for criminal offenses. 1016. Liability of the corporation to indictment. 1017. Offenses involving malice and evil intent. 1018. (a) Criminal libel. 1019. (b) Malfeasance and non-feasance. 1020. (c) Making false reports to the state. 1021. (d) Making fraudulent sale of stock. 1022. (e) Assault and battery. 1023. (f) Malicious prosecution. 1024. (g) Conspiracy by corporation.</p>	<p>§ 1025. (h) Criminal contempt of court. 1026. (i) False imprisonment. 1027. Penalty by fine or forfeiture imposed upon the corporation. 1028. Penalty by sequestration for contempt of court. 1029. Statutory penalty recoverable against the corporation in civil action. 1030. Liability of directors, officers and agents for injuries resulting in death. 1031. Presumption as to incorporation, in criminal cases.</p>
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#### References:

Liability of the corporation for frauds of officers and agents. Sections 783-791.  
Liability of directors, officers and agents for frauds and misrepresentations. Section 767.  
Criminal torts. Sections 966-971.

**§ 1015. Liability of corporation for criminal offenses.**—The courts have shown a tendency to extend the liability of corporations in civil actions for the misfeasance of their agents, and it seems now well settled that they may be held liable in suits for libel, for malicious prosecution, and for assaults and batteries, committed by their agents in the performance of their duties. In view of the further fact that they may, in such suits, be subjected to exemplary or punitive damages, the statement that they can not be held liable to any offenses which derive their criminality from evil intention, may well be questioned. The very basis of an action of libel, or for a malicious prosecution, is the evil intent, the malice of the party against whom such a suit is brought; and it is difficult to see, how it is possible to hold, that a corporation may be sued for a libel and punitive damages recovered, and at

the same time hold, that a corporation could not be indicted for such libel. The suits of libel and malicious prosecution are in their nature very like to criminal proceedings, and if they lie against a corporation, it would seem to follow that there are cases for which indictments may lie against a corporation, where the evil intention constitutes an element in the offense. And, if a corporation is liable, civilly, for an assault and battery, committed through its servants, it is going too far to say that a corporation can, in no case, be liable criminally, for any offenses against the person.<sup>1</sup> The whole course of the authorities<sup>2</sup> shows that an action for a wrong will lie against a corporation, where the act complained of is done within the scope of its incorporation, and is one which would constitute an actionable wrong, if done by an individual.<sup>3</sup>

§ 1016. **Liability of the corporation to indictment.**—The former view, that a corporation, because it has no physical body, could commit no criminal act, and having no soul, could not be a subject for punishment, is now obsolete. Under the modern rule, the policy of the law and the practice of the courts, is to hold corporations as far as practicable to the same civil liability as natural persons, for wrongful acts, and whether or not committed within the scope of its granted powers. A corporation may be indicted, or punished, for any act done, or omitted, in violation of law. It may be indicted for committing a felony or a misdemeanor, punishable by a fine or a forfeiture.<sup>4</sup> A corporation will be held guilty, and fined for the crime of violating the eight-hour law.<sup>5</sup> A national bank may be indicted for usury.<sup>6</sup> A corporation may be enjoined from doing criminal acts; as, from permitting prize fighting.<sup>7</sup> There seems to be no reasonable objection to laws which make corporations criminally liable for the misconduct of their officers and agents in the discharge of their duties.<sup>8</sup> If the laws impose duties of a general or public character upon cor-

<sup>1</sup> *Per Green, J., in State v. Baltimore, etc. R. Co.*, 15 W. Va. 380, where the corporation was held guilty of Sabbath breaking.

<sup>2</sup> *Yarborough v. Bank of England*, 16 East, 6; *Whitefield v. Southeastern Railway*, El. B. & E. 115.

<sup>3</sup> *Green v. London, etc. Co.*, 7 C. B. (N. S.) 290. *Vide supra*, § 966.

<sup>4</sup> *United States v. Alaska, etc Assn.* (1901), 1 Alaska, 217.

<sup>5</sup> *United States v. Kelso Co.*, 86 Fed. 304 (1898).

<sup>6</sup> *State v. First Nat. Bank*, 2 S. D. 568 (1892), 51 N. W. 587.

<sup>7</sup> *Columbian, etc. Club v. State* (1895), 143 Ind. 98, 28 L. R. A. 727.

<sup>8</sup> *Boston, etc. R. Co. v. State*, 32 N. H. 227 (1855).

porations, they must provide modes to compel their performance. The mode of prosecution by indictment does not seem to be open to any objection which would not equally apply to any kind of criminal prosecution. Corporations necessarily transact their business by means of agents. If they are held responsible criminally, it must generally, perhaps always, be for acts or neglects of those agents. If they are thus answerable for negligence and omissions of agents, it is argued that they may be made liable, in a proper case, for their acts.<sup>9</sup> Since the capacity to act is given corporations by law, no good reason appears why they may not intend to act in a criminal manner, as mere intentional wrong acting, is all that is necessary in a class of criminal cases.<sup>10</sup> In Missouri the statute authorizes the criminal prosecution of a corporation for libel.<sup>11</sup> The criminal code of New York, declaring that the grand jury has the power, and making it their duty, to inquire into all crimes, and to present them to the court, applies to crimes of corporations as well as of individuals, and is not affected by the sections regulating criminal proceedings against corporations.<sup>12</sup>

**§ 1017. Offenses involving malice and evil intent.**—Though from the nature of the offense, a corporation can not be guilty of treason, or perjury, or felony, it may be held liable, in criminal cases as well as in civil cases, for torts,—by exemplary or punitive damages for a wrong by its agents which involves malice or evil intent.<sup>13</sup> Although by its nature the corporation cannot be imprisoned, it may be indicted for malfeasance or misfeasance as well as for nonfeasance, and upon conviction may be punished by fine, leviable upon its property; and as other punishment, its charter may be forfeited.<sup>14</sup>

<sup>9</sup> "Towns and counties are at common law responsible for the repair of highways and bridges and liable to indictment for neglect of their duty in this respect. Turnpike corporations were usually by statute subjected to the same liability, so far as we have heard, without objection." *Boston, etc. R. Co. v. State* (1855), 32 N. H. 227.

<sup>10</sup> *1 Bishop Crim. Law*, § 418.

<sup>11</sup> *Brennan v. Tracey*, 2 Mo. App. 540.

<sup>12</sup> *People v. Equitable Gas-Light Co.* (1889), 5 N. Y. Supp. 19. Referring to the provisions of N. Y.

Crim. Code Proc., §§ 252, 675, 682, but holding that under the laws of New York, a corporation cannot by any means be compelled to appear and submit to the jurisdiction of a court wherein an indictment against the corporation has been filed.

<sup>13</sup> *Delaware, etc. Co. v. Commonwealth*, 60 Pa. St. 367, 100 Am. Dec. 570; *Commonwealth v. Proprietors, etc.*, 2 Gray (Mass.), 339.

<sup>14</sup> *State v. Passaic, etc. Soc.*, 54 N. J. Law, 260; *Commonwealth v. Pulaski, etc. Assn.*, 92 Ky. 201, 17 S. W. 442. *Vide supra*, § 966.

**§ 1018. (a) Criminal libel.**—Criminal libel involves malice as an element; such a libel will sustain an indictment.<sup>15</sup> “There are crimes of which, from their very nature, as perjury for example, corporations cannot be guilty. There are crimes to the punishment for which, for a like reason, they cannot be subjected, as in the case of felony; but whenever the offense consists in either a misfeasance or nonfeasance of duty to the public, and the corporation can be reached for punishment, as by fine and seizure of its property, precedent authorizes, and public policy requires, that it should be liable to indictment.”<sup>16</sup>

**§ 1019. (b) Malfeasance and nonfeasance.**—For malfeasance or misfeasance a corporation is indictable; as for creating a dam across a navigable river,<sup>17</sup> or for excavating a public highway or placing obstructions therein.<sup>18</sup> A railroad is indictable for a nuisance caused by stoppage of its trains in a public highway, thereby obstructing it.<sup>19</sup> A corporation may be indicted for nonfeasance for failure to perform duties it owes to the public, the non-performance of which constitutes a public nuisance, as in failure to repair a public bridge<sup>20</sup> or public canal,<sup>21</sup> or failure of a railroad to repair a highway crossed by its line.<sup>22</sup>

**§ 1020. (c) Making false reports to the State.**—False reports by national banks, constitute criminal offenses for which the national banking act provides penalty of fine and imprisonment.<sup>23</sup>

**§ 1021. (d) Making fraudulent sale of stock.**—Where a person has been drawn into a contract to purchase shares belonging to a company, by fraudulent misrepresentations of the directors, and the directors, in the name of the company, seek to enforce that contract, the misrepresentations are imputable to the company, and it is indictable for the fraud of its directors.<sup>24</sup> Under New York statutes, selling stock upon misrepresentations is punishable as grand larceny.<sup>25</sup>

<sup>15</sup> State v. Atchison, 3 Lea (Tenn.), 729, 31 Am. Rep. 663; Wharton Crim. Law, § 87; State v. Baltimore, etc., 15 W. Va. 362, 36 Am. Rep. 803.

<sup>16</sup> Commonwealth v. Pulaski, etc. Assn., 92 Ky. 201, 17 S. W. 442. *Vide supra*, § 970.

<sup>17</sup> State v. Great Works, etc. Co., 20 Me. 41, 37 Am. Dec. 38.

<sup>18</sup> State v. Ohio, etc. Co., 23 Ind. 362.

<sup>19</sup> State v. Vermont, etc. Co., 30 Vt. 108.

<sup>20</sup> Commonwealth v. Central Bridge Corporation, 66 Mass. 242.

<sup>21</sup> Delaware, etc. Co. v. County, 60 Pa. St. 367, 100 Am. Dec. 570.

<sup>22</sup> New York, etc. Co. v. State, 50 N. J. Law, 303, 53 N. J. Law, 244. *Vide supra*, § 963.

<sup>23</sup> Brackett v. Griswold (1891), 13 N. Y. Supp. 192.

<sup>24</sup> Western Bank v. Addie, L. R. 1, Sc. App. 145. See Beach, §§ 527-530.

<sup>25</sup> People v. Garrahan (1897), 19 N. Y. App. Div. 347.

**§ 1022. (e) Assault and battery.**—A corporation is liable for an assault and battery committed by its agents,<sup>26</sup> if the person guilty of the assault was acting by authority of the corporation, or if the corporation owed some duty to the person assaulted.<sup>27</sup>

**§ 1023. (f) Malicious prosecution.**—The old doctrine was that a corporation was not liable to an action for malicious prosecution, because malice is the gist of the action, and it was said that malice could not be imputed to a mere legal entity, which having no mind could have no motive and therefore no malice. But the steady process of judicial evolution tends toward the establishment of the just doctrine of the civil responsibility of a corporation for the acts of the sentient persons who represent it, and through whom it acts, and of the liability of a corporation for the acts of its agents under the conditions that attach to individuals.<sup>28</sup> By the rule of analogy, also, if actions for malicious libel,—for vexatiously and maliciously obstructing another in business, for wilful trespasses, and for assault and battery, in each of which the motives and intent of the mind are directly involved, can be maintained against a corporation aggregate, no reasons, founded upon principle, can be suggested why an action for malicious prosecution also should not be sustainable against it. When the nature of the action is considered, it comes strictly within the principles by which the actions above enumerated are maintainable. To hold a corporation amenable to this particular action, is strictly in accordance with well-settled legal principles. The action involves nothing more than a wrongful act intentionally done.<sup>29</sup> Accordingly, it is almost universally held in recent cases that a corporation is liable to an action for a malicious prosecution conducted by

<sup>26</sup> *Hewitt v. Swift*, 3 Allen (85 Mass.), 420; *Pennsylvania R. Co. v. Vandiver*, 42 Pa. St. 365, 82 Am. Dec. 520.

<sup>27</sup> *Haggerty v. Potter* (1903), 111 Ill. App. 433.

<sup>28</sup> *Vide infra*, § 968; *Williams v. Planters' Ins. Co.* (1880), 57 Miss. 759, 34 Am. Rep. 494; *New Orleans, etc. R. Co. v. Bailey*, 40 Miss. 365; *Wheless v. Second Nat. Bank*, 1 Baxt. 469, 25 Am. Rep. 783; *Reed v. Home Savings Bank*, 130 Mass. 443, 39 Am. Rep. 468; *Boogher v. Life Assn.* (1882), 75 Mo. 325, quoting approvingly Binney's observations in *Chestnut*

*Hill, etc. Co. v. Rutter*, 4 Serg. & R. 11, and overruling *Gillett v. Missouri, etc. R. Co.*, 55 Mo. 315, 17 Am. Rep. 653, where it was held that a criminal prosecution for embezzlement was not within the scope of a corporation's general or special powers, and therefore the action would not lie. *Gillett v. Missouri, etc. R. Co.*, 55 Mo. 315, 17 Am. Rep. 653, overruled by *Boogher v. Life Assn.* (1882), 75 Mo. 319.

<sup>29</sup> *Vance v. Erie Ry. Co.*, 32 N. J. 334; *Fenton v. Wilson, etc. Co.*, 9 Phila. 189; *Copley v. Grover, etc. Co.*, 2 Woods, 494.

its agents.<sup>30</sup> The want of probable cause and malice on the part of the agent in making an arrest, or causing an arrest to be made, if established, may be imputed to the corporation.<sup>31</sup>

**§ 1024. (g) Conspiracy by corporation.**—An action may be maintained against a corporation to recover damages caused by conspiracy.<sup>32</sup> If actions can be maintained against corporations

<sup>30</sup> Williams v. Planters' Ins. Co., 57 Miss. 759; Carter v. Howe Machine Co., 51 Md. 290; Wheless v. Second Nat. Bank, 1 Baxt. 469, 25 Am. Rep. 783; Goodspeed v. East Haddam Bank, 22 Conn. 530; Jordan v. Alabama Great Southern R. Co., 74 Ala. 85, 49 Am. Rep. 800, overruling Owsley v. Montgomery, etc. R. Co., 37 Ala. 560; Pennsylvania Co. v. Weddle, 100 Ind. 138; Morton v. Metropolitan Life Ins. Co., 34 Hun, 366. "The reasons were well stated by the learned court in the leading case upon the subject. These institutions have so multiplied and extended within a few years, that they are connected with and in a great degree influence all the business transactions of this country and give tone and character to some extent to society itself. We do not complain of this; but we say that as new relations from this cause are formed and new interests created, legal principles of a practical rather than a legal character must be applied. . . . The views of the old lawyers, regarding the real nature of corporations, to a great extent are exploded in modern times, and it is believed that now these bodies are brought to the same civil liabilities as natural persons, so far as this can be done practically, and consistently with their respective charters. And no good reason is discovered why this should not be so; nor why it cannot be done, in a case like this, without violating any sensible or useful principle. . . . But after all, the objection to the remedy of this plaintiff against the bank in its corporate

capacity, is not so much that as a corporation it cannot be made responsible for torts committed by its directors, as that it cannot be subjected to that species of tort which consists in motive and intention. The claim is, that as a corporation is ideal only, it cannot act from malice and therefore cannot commence or prosecute a malicious or vexatious suit. This syllogism or reasoning might have been very satisfactory to the schoolmen of former days; more so, we think, than to the jurist who seeks to discover a reasonable and appropriate remedy for every wrong. To say that a corporation cannot have motives and act from motives is to deny the evidence of our senses, when we see them thus acting, and effecting thereby results of the greatest importance every day. And if they can have any motive, they can have a bad one; they can intend to do evil as well as to do good. If the act done is a corporate one, so must the motive and intention be. In the present case, to say that the vexatious suit, as it is called, was instituted, prosecuted and subsequently sanctioned by the bank, in the usual modes of its action; and still to claim that although the acts were those of the bank, the intention was only that of the individual directors, is a distinction too refined, we think, for practical application." Goodspeed v. East Haddam Bank, 22 Conn. 530.

<sup>31</sup> Krulevitz v. Eastern R. Co., 140 Mass. 575.

<sup>32</sup> Buffalo, etc. Co. v. Standard Oil Co. (1887), 106 N. Y. 669.

for malicious prosecution, libel, assault and battery, and other torts, there is no reason for holding that actions may not be maintained against them for conspiracy.<sup>33</sup> For it is well settled by the authorities, that the malice and wilful intent needed to sustain such actions, may be imputed to corporations.<sup>34</sup>

**§ 1025. (h) Criminal contempt of court.**—A corporation may be punished for contempt of court.<sup>35</sup> Thus, where officers of a corporation are enjoined from infringing a patent-right, yet subsequently engage in the manufacture of the infringing article, as managing officers of another corporation, not licensed to manufacture under the patent, they will be guilty of contempt.<sup>36</sup> But a corporation can only be punished for contempt through its officers, or those acting in aid of it. Thus, through the presence of its agent, a Connecticut corporation is subject to the jurisdiction of the Illinois courts, for the purpose of proceedings for contempt. It is sufficient to compel defendant, as manager in Illinois, to answer to the contempt proceedings, without making his company *eo nomine* a party.<sup>37</sup>

**§ 1026. (i) False imprisonment.**—A railroad company is liable in punitive damages for false imprisonment committed by authority of the company.<sup>38</sup>

**§ 1027. Penalty by fine or forfeiture imposed upon the corporation.**—The penalty of felony is generally imprisonment, or death, but it cannot be applied in the case of a corporation. For this reason it cannot be indicted for felony where such is the penalty, but it may be indicted for offenses where a fine is any part of the penalty imposed.<sup>39</sup> Although a corporation cannot be capitally punished, or imprisoned, there is no reason why it may not be fined, or suffer the loss of its corporate existence, for the same act which would subject an individual to the gallows.<sup>40</sup> Ac-

<sup>33</sup> Buffalo, etc. Co. v. Standard Oil Co. (1887), 106 N. Y. 669.

etc. Co. v. Superior Court (1884), 65 Cal. 187.

<sup>34</sup> Buffado, etc. Co. v. Standard Oil Co. (1887), 106 N. Y. 669; Morton v. Metropolitan Life Ins. Co., 103 N. Y. 645; affirming 34 Hun, 367; Reed v. Home Sav. Bank, 130 Mass. 443; Krulivitz v. Eastern R. Co., 140 Mass. 575; Western News Co. v. Wilmarch, 33 Kan. 510.

<sup>35</sup> Iowa Barb Steel Wire Co. v. Southern Barbed Wire Co., 30 Fed. Rep. 123.

<sup>35</sup> People v. Albany, etc. R. Co., 12 Abb. Pr. 171, 20 How. Pr. 358; Mayor v. Ferry Co., 64 N. Y. 624; United States v. Memphis, etc. R. Co., 6 Fed. Rep. 237; Golden Gate,

<sup>36</sup> Sercomb v. Catlin (1889), 128 Ill. 556; King v. Barnes, 113 N. Y. 476.

<sup>38</sup> Wheeler, etc. Mfg. Co. v. Boyce (1887), 36 Kan. 350, 59 Am. Rep. 571. *Vide supra*, § 969.

<sup>39</sup> Commonwealth v. Pulaski, etc. Assn., 92 Ky. 201.

<sup>40</sup> Bishop Crim. Law, § 423.

cordingly, it is held that a corporation may be sentenced, or adjudged to pay a fine and abate a nuisance.<sup>41</sup> But while it can be fined, it seems it can not be compelled to perform a specific duty.<sup>42</sup> Neglect of a public duty, however, by a corporation may always be prosecuted and punished by indictment,<sup>43</sup> except for such acts as involve criminal intent or personal violence.<sup>44</sup> Thus a railway company is liable to indictment for the act of its officer or employe in issuing receipts for goods without stamping them, if the law requires them to be stamped.<sup>45</sup> But a higher degree of proof is required in indictment proceedings, than in civil actions against companies.<sup>46</sup>

**§ 1028. Penalty by sequestration, for contempt of court.**—Though a corporation can not be imprisoned, it may be punished by a fine for either a civil or a criminal contempt of court, as for publication in a newspaper of an article, pending a trial, whereby the jury might be prejudiced.<sup>47</sup> In case of disregard of an injunction against a corporation, all its officers and agents to whose knowledge it comes, are guilty of contempt, if they disregard it,<sup>48</sup> and may be fined for contempt of court.<sup>49</sup> Although the corporation is distinct from its officers or members, yet the latter may be held answerable in contempt of court for failure to obey orders, decrees, or judgments of courts.<sup>50</sup> The corporation is also bound to obey the court, and, upon failure, the court will sequester the corporate property.<sup>51</sup>

**§ 1029. Statutory penalty recoverable against the corporation in civil action.**—Statutes in civil cases, imposing penalty for doing of prohibited acts, are construed as applicable to corporations, though not mentioned in the statute otherwise than as

<sup>41</sup> *Delaware, etc. Co. v. Commonwealth*, 60 Pa. St. 367, in which it is said that the advantage of indicting a company in nuisance cases is that it may be compelled to abate the nuisance, while a director, officer or agent could only be fined.

<sup>42</sup> *Pittsburgh, etc. Ry. Co. v. Commonwealth*, 10 Am. & Eng. R. Cas. 327.

<sup>43</sup> *Commonwealth v. Central, etc. Co.*, 12 Cush. 245; *Boston, etc. R. Co. v. State*, 32 N. H. 215.

<sup>44</sup> *Queen v. Birmingham, etc. Ry. Co.*, 3 Gale & D. 243.

<sup>45</sup> *United States v. Baltimore,*

etc. R. Co. (U. S. C. C. D. W. Va. 1868), 7 Am. L. Reg. (N. S.) 757.

<sup>46</sup> *East Tennessee, etc. R. Co. v. Humphreys*, 12 Lea, 200, 15 Am. & Eng. R. Cas. 472.

<sup>47</sup> *Telegram, etc. Co. v. Commonwealth*, 172 Mass. 294, 44 L. R. A. 159, 70 Am. St. Rep. 280.

<sup>48</sup> *King v. Barnes*, 113 N. Y. 476.

<sup>49</sup> *Vide supra*, SEQUESTRATION, § 1012; *In re Tift*, 11 Fed. 463.

<sup>50</sup> *Sercomb v. Catlin*, 128 Ill. 566, 15 Am. St. Rep. 147.

<sup>51</sup> *Jones v. Boston Mill Corp.*, 21 Mass. 507, 16 Am. Dec. 358; *Reid v. Northwestern Ry. Co.*, 32 Pa. St. 257.

"person or persons." "Corporations are to be considered as 'persons,' when the circumstances in which they are placed are identical with those of natural persons expressly included in a statute."<sup>52</sup> For examples, a statute imposing a penalty upon the "owner, agent, or superintendent of any manufacturing establishment," for employing children under certain age, for more than certain number of hours' work a day,<sup>53</sup> and a statute imposing a penalty upon "any person" for selling intoxicating liquors to an habitual drunkard,<sup>54</sup> and a statute providing penalty for interfering with or removing or breaking down a canal or its works.<sup>55</sup> And in case of a statute providing that when the death of any person is caused by the wrongful act of another, an action for damages will lie against a corporation as well as against an individual.<sup>56</sup>

**§ 1030. Liability of directors, officers and agents for injuries resulting in death.**—Directors of a railway are not criminally liable for accidents where they were not personally in charge of the running of the road.<sup>57</sup>

*For injuries resulting in death*, a civil suit to recover damages could not be maintained at common law.<sup>58</sup> This defect has been remedied in England by Lord Campbell's Act, which provides a method whereby the family of the deceased may recover compensation;<sup>59</sup> and similar acts have been passed by the legislatures of the American states.<sup>60</sup> In Maine, New Hampshire and Massachusetts, indictment and fine is used as a method of recovering damages for causing death, the fine being for the benefit of the deceased's relatives.<sup>61</sup>

<sup>52</sup> Stewart v. Waterloo, etc., 71 Iowa, 226, 60 Am. Rep. 786.

<sup>53</sup> Benson v. Monson, etc. Co., 9 Metc. (Mass.) 562; Overland, etc. Co. v. People (Colo. 1904), 75 Pac. 924.

<sup>54</sup> Stewart v. Waterloo, etc. Co., 71 Iowa, 226, 60 Am. Rep. 786.

<sup>55</sup> Cumberland, etc. Corp. v. City of Portland, 56 Me. 77.

<sup>56</sup> Fleming v. Tex. etc., 87 Tex. 238; Donaldson v. Miss. etc. Co., 18 Iowa, 280, 87 Am. Dec. 391.

<sup>57</sup> State v. Wabash Ry., 115 Ind. 466; State v. Vermont Central R. Co., 30 Vt. 109.

<sup>58</sup> Beach on Railways, § 1010.

<sup>59</sup> Beach on Railways, § 1010,

citing Blake v. Midland Ry. Co., 18 Q. B. 93; Duckworth v. Johnson, 4 Hurl. & N. 653; Boulter v. Webster, 11 L. T. N. S. 598; Pym v. Great Northern Ry. Co., 4 Best & Sm. 396.

<sup>60</sup> Brown v. Buffalo, etc. Co., 22 N. Y. 191; Cooley on Torts, \*271; 2 Thompson on Negligence, § 90; Beach on Railways, § 1010.

<sup>61</sup> State v. Maine Central R. Co., 60 Me. 490; State v. Grand Trunk Ry. Co., 61 Me. 114; Boston, etc. R. Co. v. State (1855), 32 N. H. 215; Commonwealth v. Boston, etc. R. Co. (1882), 8 Am. & Eng. R. Cas. 297; Commonwealth v. Boston, etc. R. Co., 129

§ 1031. Presumption as to incorporation in criminal cases. Where the question of incorporation arises in criminal prosecutions, though the question arises incidentally, and the corporation is not a party, its incorporation will be presumed from user, and exercise of corporate privileges.<sup>62</sup> As, in prosecution for burglary;<sup>63</sup> or for forgery of a draft on a corporation;<sup>64</sup> or for larceny;<sup>65</sup> or for destruction of a vessel with intent to injure the underwriters;<sup>66</sup> or for arson with intent to defraud the insurance company;<sup>67</sup> or for counterfeiting bank notes on an incorporated bank.<sup>68</sup>

Mass. 500; Commonwealth v. Boston, etc. R. Co., 11 Cush. 512; Commonwealth v. Metropolitan R. Co., 107 Mass. 236; Commonwealth v. Fitchburg R. Co., 11 Allen, 189; Commonwealth v. Vermont, etc. R. Co., 108 Mass. 7; Commonwealth v. Fitchburg R. Co., 120 Mass. 372; Commonwealth v. Boston, etc. R. Co., 126 Mass. 61; Commonwealth v. East Boston, etc. Co., 13 Allen, 589; Commonwealth v. Proprietors (1854), 7 Gray, 346; Queen v. Great North, etc. Ry., 9 Ad. & El. N. R. 325.

<sup>62</sup> Calkins v. State, 18 Ohio St. 366; 98 Am. Dec. 121.

<sup>63</sup> State v. Thompson, 23 Kan. 333, 33 Am. Rep. 165.

<sup>64</sup> People v. Frank, 28 Cal. 507; State v. Jackson, 90 Mo. 156.

<sup>65</sup> Braithwaite v. State, 28 Neb. 832.

<sup>66</sup> People v. Hughes, 29 Cal. 357; United States v. Amedy, 11 Wheat. 392.

<sup>67</sup> People v. Hughes, 29 Cal. 257.

<sup>68</sup> Reed v. State, 15 Ohio, 217; People v. Caryl, 12 Wend. 547; Brown v. State, 11 Ohio, 276.

## CHAPTER XLI.

### RAILROAD.

§ 1032. Quasi-public corporations. 1033. Railroads. "Railways" are not public highways. 1034. Legislative control of railroads and other public corporations. 1035. Legislative power to regulate and reduce rates and charges. 1036. Discrimination in rates. Rebates from regular rates. 1037. Incidental powers of railroads. 1038. Location of road and stations. Removal of stations. 1039. Union depot. Terminal facilities for joint and several use of railroads. 1040. Right of way. Power of eminent domain not transferable. 1041. Power of railroads to purchase and sell lands, and other property. 1042. Power to lease, sell or consolidate. 1043. Consolidation of railroads. 1044. Power to lease the corporate franchise. 1045. Construction of statutory authority to lease. 1046. Liability of the lessor. 1047. Line between liability of lessor and lessee. 1048. Liability of the lessee. 1049. New York statutes as to lease of railways.	§ 1050. What a railroad lease carries. 1051. The law governing leased railroads. 1052. Power to mortgage. 1053. Power of railroad company to acquire stock in other corporations. 1054. Traffic arrangements and contracts between connecting railroads. 1055. Effect of traffic arrangements. 1056. "Pooling" contracts between railroads. 1057. "Pools" and combinations between competing parallel railroads. 1058. Running steamboats and ferries to do connecting business. 1059. <i>Ultra vires</i> acts of railroads. Business not allowed. 1060. Powers of railroad president. 1061. Certain powers of railroad directors. 1062. Operation of railway. Liability for failure to operate. <i>Mandamus</i> . 1063. Injunction against interference by "strikers." 1064. Railroad not liable to sale under levy of execution. 1065. Subscription, payable in bonds, by way of municipal aid in behalf of railroads.
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#### References:

Common carriers, duties and liabilities. Sections 1104-1110.  
Street railways, electric railways. Sections 1066-1071.  
Sleeping car companies. Section 1129.  
Car Trust association. Section 1399..

Interstate and foreign railway corporations. Sections 937, 1277, 1329-1360.  
 Right of way. Power of eminent domain. Sections 873-886.  
 Power to lease franchise and property. Section 836.  
 Power to sell and convey. Section 831.  
 Power to acquire and hold its own stock. Section 859.  
 Power to hold stock of other corporations. Sections 855-938.  
 "Pools" and combinations between competing railways. Sections 936-938, 946.  
 Northern Security Company's case. Section 939.  
 Traffic contracts between connecting railroads. Section 945.  
 Rates and rebates. Legislative control. Sections 925, 926.  
 Taxation of railroads. Sections 525, 528-534.  
 Taxation of railroads. Sections 525, 529-534.  
 Attachment and execution. Section 662a.  
 Insolvency. Sections 1205-1217. Receivers. Sections 1218-1245.  
 Bonds and coupons. Sections 1137-1163.  
 Mortgage. Sections 1166-1183. Foreclosure and sale. Sections 1184-1204.  
 Forfeiture of charter. Sections 1292-1305.  
 Dissolution and winding-up. Sections 1306-1328.  
 Reincorporation and reorganization. Sections 1246-1261.

**§ 1032. Quasi-public, or public-service, corporations.**—A *quasi-public* corporation, or *public-service* corporation, is one, which, though technically private, is yet of a *quasi-public* character, having in view some general public enterprise in which the public interests are directly involved to such an extent as to justify conferring upon it, important governmental powers, such as the exercise of the right of eminent domain. Of this class are railroad, turnpike and canal companies, water, gas, and telegraph companies. Also another class is of corporations strictly private, the direct object of which is not to promote public interests, and in which the public have no concern, except the indirect benefits resulting from the promotion of trade, and the development of the resources of the country, such as bridge, irrigation and mining companies.<sup>1</sup> A railroad company's road is a *quasi-public* highway, though the company itself is a private corporation.<sup>2</sup> Other definitions have been given, as: "A body which exercises certain functions of a corporate character, but which has not been created a corporation by any statute."<sup>3</sup> This is no corporation at all.

<sup>1</sup> Miners' Ditch Co. v. Zellenbach (1869), 37 Cal. 577, Sawyer, C. J.; Anderson's Law Dictionary, p. 265.

<sup>2</sup> Pierce v. Commonwealth (1883), 104 Pa. 155.

<sup>3</sup> School District v. Insurance Co. (1880), 103 U. S. 708, Miller, J.

"Such auxiliaries of the State, as a county, a school district, or other involuntary corporation, with liabilities not as great as those of a municipal corporation."<sup>4</sup> It is error to class these as *quasi-public*; they are public corporations.

*Public corporations*, otherwise called municipal, are not within the scope of this work. Such corporations exist for political purposes only, as a town, county, State, school district, board of supervisors, etc.<sup>5</sup> The accumulated wealth of the modern world tends more and more to investment in corporate enterprises. Foremost among these are railroads, telegraphs, and others which, though private corporations, are such as owe duties to the public, which demand special legislative control. The evolution of business enterprise, in modern times, tends to bring under legislative control many business corporations, which were formerly considered strictly private, and which, though private yesterday, are today public in their nature, being subject to duties to serve the public when called upon to do so. A *quasi-public* corporation is one constituted of private persons to engage in a business, public in its nature, and where it must serve all who apply. It is therefore granted the power to acquire, under exercise of the power of eminent domain, land, rights of way, and other property essential to the performance of its public duties. Unlike a strictly private corporation, it has no power, unless expressly conferred, to mortgage, lease, or sell any part of its property which is necessary to the performance of its duties to the public, nor is it subject to be levied upon and taken and sold under execution. The business itself is a franchise or special privilege, and is subject to control of the State. Its rates are subject to reduction, or other regulation by the legislature, which exercises special control over *quasi-public* corporations, to whatever extent it deems expedient for the protection of life and property, and the public safety, health, and morals; and to prevent excessive charges for public service, or unlawful discrimination in rates.<sup>6</sup> The most important *quasi-public* corporations are separately considered in this and the next following chapters.

**§ 1033. Railroads. Railways.**—The business of railroads is of a public nature. It pertains to the public, and it can not be disputed that a railroad is a public corporation; that is to say, a *quasi-public* corporation.<sup>7</sup> Railroads are distinguished as steam

<sup>4</sup> Barnes v. District of Columbia (1875), 91 U. S. 552.

<sup>5</sup> Dillon, Municipal Corporations.

<sup>6</sup> Board of Education v. Bakeswell, 122 Ill. 339.

<sup>7</sup> United States v. Trans-Mis-

railroads, and street railways; and electric might be added, but the same principles of the law of *quasi-public* corporations apply to all of them. The word, "railroad" in a statute, includes foreign corporations, unless restricted to domestic corporations.<sup>8</sup> The word "railway," in Pennsylvania, applied alone to street railways, and the word "railroad" only to steam railroads; but there is no longer any distinction made between the words "railroad" and "railway."<sup>9</sup>

*Railroad is not a public highway.*—The first English railways were free to the cars of all persons paying the regular tolls and complying with the company's regulations; and in New England, they were at first similarly treated as public highways, like turnpikes, but that theory was long ago abandoned.<sup>10</sup>

**§ 1034. Legislative control of railroads, and other public corporations.**—As examples of the exercise of the power of the legislature to control corporations: It may prohibit a railroad from charging more for a short haul than for a long one within the State.<sup>11</sup> The legislature may by statute, require inspection of mines by official inspectors. Their fees to be paid by the mine owners.<sup>12</sup> It may prescribe the number of trains which a railroad corporation, running through the State, shall stop at cities of a certain specified population.<sup>13</sup> It may require its regular passenger trains to stop at county seats;<sup>14</sup> require railroads to have gates at crossings;<sup>15</sup> require of railroads to be incorporated; require the sale of mileage books to passengers, when demanded; (*vide infra*, § 1036)<sup>16</sup> require corporations to pay their employes at least once a month,<sup>17</sup> or on the day of their discharge;<sup>18</sup> require

souri, etc. Assn. (1897), 166 U. S. 290; Chicago, etc. Ry. v. Wabash, etc. Ry. (1894), 61 Fed. Rep. 993.

<sup>8</sup> St. Louis, etc. R. R. v. Terre Haute, etc. R. R. (1892), 145 U. S. 393; Pittsburgh, etc. Ry. v. Keokuk, etc. Bridge Co. (1889), 131 U. S. 371; Day v. Ogdensburg, etc. R. R. (1887), 107 N. Y. 129.

<sup>9</sup> Old Colony, etc. Co. v. Allentown, etc. Co. (1899), 192 Pa. St. 596.

<sup>10</sup> Lake Superior, etc. R. R. v. United States (1876), 93 U. S. 442. *Vide*, 29 L. R. A. 378.

<sup>11</sup> Louisville, etc. R. R. v. Kentucky (1902), 183 U. S. 503.

<sup>12</sup> St. Louis, etc. Co. v. Illinois (1902), 185 U. S. 203.

<sup>13</sup> Lake Shore, etc. Ry. v. Ohio (1899), 173 U. S. 285.

<sup>14</sup> Cleveland, etc. Ry. v. People (1898), 175 Ill. 359; Cleveland, etc. Ry. Illinois (1900), 177 U. S. 514.

<sup>15</sup> People v. Long Island (1892), 134 N. Y. 506.

<sup>16</sup> Purdy v. Erie R. R. (1900), 162 N. Y. 42, 56 N. E. 508, 48 L. R. A. 669.

<sup>17</sup> Skinner v. Garnett, etc. Co. (1899), 96 Fed. Rep. 735.

<sup>18</sup> St. Louis, etc. Ry. v. Paul (1897), 64 Ark. 83, 40 S. W. 705, 37 L. R. A. 504, 62 Am. St. Rep. 154; Leep v. St. Louis, etc. Ry.

redemption in cash by a corporation of any store-orders it may issue.<sup>19</sup> It may limit the hours of work of women and children in the employment of a corporation;<sup>20</sup> may prohibit the manufacture and sale of liquors by a corporation, but it can not prohibit an interstate railroad from delivery of intoxicating liquors, to a resident within the State.<sup>21</sup> It may require railroads to fence their right-of-way.<sup>22</sup> It can not require a railroad to accept in payment of fares the tickets of another railroad.<sup>23</sup> The State may compel a railroad company to permit another to cross its tracks,<sup>24</sup> or to connect with it.<sup>25</sup> It is beyond the power of city councils to authorize a switch-track to be established from a steam railroad along a public street, and across a sidewalk for private business only.<sup>26</sup> A railroad company is not required to so construct its bridges as to allow a person safe standing-room during passage of a train.<sup>27</sup> Where the city ordinance of 1881, granted to a company with general railroad powers privilege to operate street cars with limited powers, and the ordinance of 1887 gave permission to operate a suburban passenger railway, this did not imply intention of the city that the latter ordinance should not be subject to the limit of time fixed in the earlier.<sup>28</sup> A statute is not unconstitutional which imposes a penalty on a railroad for failure to stop its train, before crossing an intersecting railroad.<sup>29</sup>

**§ 1035. Legislative power to regulate and reduce rates and charges.**—A railroad must furnish transportation at reasonable rates of charge. For refusal in any case of excessive charge, it is liable to repayment of the money, in an action at law for damages.<sup>30</sup> The legislature may compel a railroad to reduce its rates for transportation when they are excessive.<sup>31</sup> It may empower

(1894), 58 Ark. 407, 23 L. R. A. 264, 41 Am. St. Rep. 109.

<sup>19</sup> Knoxville, etc. Co. v. v. Harbison (1901), 183 U. S. 13.

<sup>20</sup> Commonwealth v. Hamilton Manuf. Co. (1876), 120 Mass. 383.

<sup>21</sup> Bowman v. Chicago, etc. Ry. (1888), 125 U. S. 465.

<sup>22</sup> Buffalo, etc. Co. v. Delaware, etc. R. R. (1891), 130 N. Y. 152.

<sup>23</sup> Attorney General v. Boston, etc. R. R. (1893), 160 Mass. 62, 22 L. R. A. 112.

<sup>24</sup> Baltimore, etc. Co. v. Union Ry. Co. (1871), 35 Md. 224, 6 Am. Rep. 397.

<sup>25</sup> Branson v. City of Philadelphia, 47 Pa. St. 329.

<sup>26</sup> Ceregino v. Oregon, etc. Co. (Utah, 1903), 73 Pac. 634.

<sup>27</sup> Erie Co. v. McCormick (Ohio, 1903), 68 N. E. 571.

<sup>28</sup> Chicago Terminal T. R. Co. v. City of Chicago (1903), 203 Ill. 576, 63 N. E. 99.

<sup>29</sup> State v. Chicago, etc. Ry. Co. (1903), 96 N. W. 904.

<sup>30</sup> Lough v. Outerbridge (1894), 143 N. Y. 271, 25 L. R. A. 674, 42 Am. St. Rep. 704.

<sup>31</sup> Munn v. Illinois (1876), 94 U. S. 113; Spring Valley, etc. v.

a State commission to regulate rates.<sup>32</sup> Congress may reduce rates charged by an interstate land grant railroad,<sup>33</sup> and may regulate rates upon interstate traffic, under the interstate commerce law. The legislature may reduce rates where no injustice is done to stockholders.<sup>34</sup> Where the charter of a street railway corporation authorized the corporation to fix the rate of fare, which it fixed at five cents per passenger, the legislature can not reduce the rate, so long as the charter is in force.<sup>35</sup> A street railway franchise granted by a municipal corporation, is as fully protected as if granted by the legislature directly.<sup>36</sup> The enforcement of a municipal ordinance, fixing street railway traffic at an unreasonably low rate, may be enjoined by any bondholder or stockholder of the corporation.<sup>37</sup> Where the fares of a street railway company were fixed by municipal ordinance in pursuance of contract with the railway company, the city has no power to reduce the rates.<sup>38</sup> Where a city is authorized to contract with a water-works company to furnish water, "at such rates as may be fixed by an ordinance," it may from time to time reduce such rates.<sup>39</sup> Even though the original ordinance fixed the rates for private as well as for public use, this does not preclude the city from making any subsequent reduction.<sup>40</sup> A city may be enjoined from constructing its own waterworks, in competition with a water-works company, with which it contracted, for a term of years, giving it exclusive right to supply water within the city limits; and the city may be so enjoined, though acting under express legislative authority to construct its own waterworks in competition.<sup>41</sup>

Schottler (1884), 110 U. S. 347; Stone v. Farmers', etc. (1886), 116 U. S. 307; Wabash, etc. Ry. v. Illinois (1886), 118 U. S. 557; Chicago, etc. Ry. v. Minnesota (1889), 134 U. S. 418; Budd v. New York (1891), 143 U. S. 517; Chicago, etc. Ry. v. Wellman (1892), 143 U. S. 339; Minneapolis R. R. v. Minnesota (1890), 134 U. S. 467; Chicago, etc. R. R. v. Tompkins, 90 Fed. Rep. 363 (1898); Chicago, etc. R. R. v. Jones (1894), 149 Ill. 361, 24 L. R. A. 141, 41 Am. St. Rep. 278.

<sup>32</sup> Matthews v. Board, etc. (1899), 97 Fed. Rep. 400.

<sup>33</sup> Atlantic, etc. R. R. v. United States (1896), 76 Fed. Rep. 186;

<sup>34</sup> St. Louis, etc. Ry. v. Ryan (1892), 56 Ark. 245, 19 S. W. 839.

<sup>35</sup> Central Trust Co. v. Citizens' Street Ry. (1897), 82 Fed. Rep. 1.

<sup>36</sup> Mercantile, etc. Co. v. Collins' Park, etc. R. R. (1900), 99 Fed. Rep. 812.

<sup>37</sup> Old Colony T. Co. v. Atlanta (1897), 83 Fed. Rep. 39.

<sup>38</sup> Detroit v. Detroit, etc. Ry. (1902), 184 U. S. 368.

<sup>39</sup> Freeport, etc. Co. v. Freeport City (1901), 180 U. S. 587.

<sup>40</sup> Rogers, etc. Co. v. Ferugus (1901), 180 U. S. 624; City of Danville v. Danville, etc. Co. (1899), 178 Ill. 299, 69 Am. St. Rep. 304.

<sup>41</sup> Vicksburg, etc. Co. v. Vicksburg ((1902), 185 U. S. 65.

The legislature is not the sole and final judge as to what are reasonable rates to be charged by railroad companies. Its determination, or that of commissioners appointed by it, is reviewable by the courts. They will restrain any reduction of rates which practically destroys the value of the railroad property to its owners.<sup>42</sup> The United States Supreme Court said:—"When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clauses of the constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, State, or nation, without any right of appeal to the courts, is a proposition which for a moment can not be tolerated. . . . It is often said that the legislature is presumed to act with full knowledge of the facts upon which its legislation is based. This is undoubtedly true, but when it is assumed from that, that its judgment upon those facts is not subject to investigation, the inference is carried too far. Doubtless, upon mere questions of policy, its conclusions are beyond judicial consideration."<sup>43</sup> In a later case of reduction of rates by the Texas railroad commission, the same court said:—"There is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and . . . especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the constitution of the United States, as depriving the companies of their property, without due process of the law, and as depriving them of the equal protection of the laws."<sup>44</sup> And in still another case, the court said:—"This power to regulate, is not equivalent of confiscation. Under pretense of regulating fares and freights, the State can not require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use, without just compensation, or without due process of law."<sup>45</sup> A statute is void which, in undertaking to regulate the rates to be charged by a railroad company, in effect deprives the company of its property.<sup>46</sup> The tolls of an interstate

<sup>42</sup> *Smyth v. Ames* (1898), 169 U. S. 466.

<sup>43</sup> *Chicago, etc. Ry. v. Tompkins* (1900), 176 U. S. 167.

<sup>44</sup> *Reagan v. Farmers' L. & T. Co.* (1894), 154 U. S. 362.

<sup>45</sup> *Stone v. Farmers' Loan & Trust Co.* (1886), 116 U. S. 307.

<sup>46</sup> *Lake Shore, etc. Co. v. Smith*, 173 U. S. 684.

bridge company can not be reduced by the legislature of either State, although the bridge company was incorporated in both. The exclusive jurisdiction over such a bridge is in the United States Congress.<sup>47</sup> The legislature may reduce the rates of charge of an incorporated elevator company, where those charges are excessive.<sup>48</sup> A State constitution can not prevent courts from reviewing the reasonableness of reduction of rates by railroad commissioners.<sup>49</sup> A statute, giving to a railroad commission power to reduce railroad rates, without providing for any judicial review thereof, is unconstitutional.<sup>50</sup> A reduction of rates by railroad commissioners, is unconstitutional, in the absence of the investigation as to their reasonableness.<sup>51</sup> The State may require the railroad corporations to pay the expense of its railroad commission.<sup>52</sup> The legislature may delegate its power to reduce rates, to railroad commissioners.<sup>53</sup>

(*Vide* Trusts and Monopolies *supra*, §§ 942-947 and Legislative control of rates, §§ 924,925.)

**§ 1036. Discrimination in rates. Rebates from regular rates.**—The rule as to discrimination is that the carriers' obligation is to give like rates to all freight under like circumstances. Unjust discrimination in rates is generally prohibited by statute. Where the rates of transportation are not unreasonably high, railroad companies may discriminate by reduction to particular persons or localities. This is not unjust discrimination.<sup>54</sup> A statute is unconstitutional which requires railroads to sell thousand-mile tickets at two cents a mile, because such requirement is discrimination in favor of the wholesale buyer of tickets.<sup>55</sup> Interstate shipments are not affected by a constitutional prohibition against charge by a railroad of a higher rate for a short haul than for a longer one, on the same line and in the same direction.<sup>56</sup> A

<sup>47</sup> Covington, etc. Bridge Co. v. Kentucky (1904), 154 U. S. 204.

<sup>48</sup> Brass v. North Dakota (1894), 153 U. S. 391.

<sup>49</sup> Southern Pacific Co. v. Railroad Comm'r's (1896), 78 Fed. Rep. 236; St. Louis, etc. Ry. v. Gill (1895), 136 U. S. 649.

<sup>50</sup> Louisville, etc. R. R. v. M'Chord (1900), 103 Fed. Rep. 216.

<sup>51</sup> Mercantile T. Co. v. Texas, etc. Ry. (1892), 51 Fed. Rep. 529.

<sup>52</sup> Charlotte, etc. R. R. v. Gibbes (1892), 142 U. S. 386.

<sup>53</sup> Georgia, etc. Co. v. Smith (1888), 128 U. S. 174.

<sup>54</sup> Hoover v. Pennsylvania R. R. Co. (1893), 156 Pa. St. 220; Bayles v. Kansas Pac. Ry. Co., 13 Colo. 181 (1899), 22 Pac. 341, 5 L. R. A. 480; Langdon v. New York, etc. R. R. Co. (1890), 9 N. Y. Supp. 245.

<sup>55</sup> Lake Shore, etc. Ry. Co. v. Smith (1899), 173 U. S. 684.

<sup>56</sup> Louisville, etc. R. R. Co. v. Eubank (1902), 184 U. S. 27.

railroad is liable in damages for refusal to furnish cars to a shipper, for freight offered, while supplying cars at the same time to his competitors.<sup>57</sup> It seems to be a matter of course that a railroad company may make contracts for transportation for a fixed future period;<sup>58</sup> and even that a contract entered into by a railroad company, before the completion of its line, for the carriage of freight, is not necessarily *ultra vires* nor invalid.<sup>59</sup> But railway companies can not discriminate in rates between shippers, by allowing rebates to some shippers to the exclusion of others.<sup>60</sup> They may, however, discriminate in rates between customers not in like condition, if the discrimination is fair and reasonable, where the object is to obtain competitive traffic.<sup>61</sup> And it has been repeatedly held in such cases that in the absence of direct legislation, the rates are subject only to the common-law limitation of reasonableness.<sup>62</sup>

*Rebates from regular rates.*—A rebate allowed from published tariff rates is not unjust discrimination, but an agreement not to allow similar rebate to others, is void.<sup>63</sup> A rebate allowed because of large amount of freight shipped, is unjust discrimination, and a wrong to the person who is disfavored.<sup>64</sup> Discrimination in favor of oil shipped in tank-cars, is illegal discrimination.<sup>65</sup>

**§ 1037. Incidental powers of railroads.**—A railroad may give to a bus and baggage company exclusive right to solicit

<sup>57</sup> Chicago, etc. R. R. Co. v. Wollcott (1895), 141 Ind. 267, 50 Am. St. Rep. 320.

<sup>58</sup> Cleveland & Mahoning R. Co. v. Himrod Furnace Co., 37 Ohio St. 321, 41 Am. Rep. 509.

<sup>59</sup> And where it has been so far executed that the company has received the benefits thereof, it cannot, while retaining such benefits, assert that it had no power to make the contract. Louisville, etc. Ry. Co. v. Flannagan (1888), 113 Ind. 488.

<sup>60</sup> Stewart v. Lehigh Valley R. Co. (1875), 38 N. J. L. 505; Messinger v. Pennsylvania R. Co., 37 N. J. 531 (1874), 36 N. J. 407, 13 Am. Rep. 457. In the latter case Judge Bedie says: "Because the institution, so to speak, is public, every member of the community stands on an equality as to right to its benefit, and, therefore, the

carrier cannot discriminate between individuals for whom he will render the service."

<sup>61</sup> Ragan v. Aiken (1882), 9 Lea, 609, 42 Am. Rep. 684; *Ex parte Benson* (1882), 18 S. C. 38, 44 Am. Rep. 564; Johnson v. Pensacola, etc. R. Co., 16 Fla. 623, 667, 26 Am. Rep. 731; Houston, etc. Ry. Co. v. Rust (1882), 58 Tex. 98; Munhall v. Pennsylvania R. Co. (1879), 92 Pa. St. 150.

<sup>62</sup> Ruggles v. Illinois, 108 U. S. 536.

<sup>63</sup> Scofield v. Lake Shore, etc. Ry. Co. (1885), 43 Ohio St. 571, 54 Am. Rep. 846; Kansas Pac. Ry. Co. v. Bayles (1894), 19 Colo. 348.

<sup>64</sup> Hays v. Pennsylvania Co., 12 Fed. Rep. 309 (1882).

<sup>65</sup> State v. Cincinnati, etc. R. R. (1890), 47 Ohio St. 130.

business on its premises.<sup>66</sup> It may grant extra facilities to an express company, exclusively, for doing business on its road.<sup>67</sup> It may authorize a telegraph company to build its telegraph line upon the right-of-way of the railroad, with exclusive right in the telegraph company to use such telegraph line.<sup>68</sup> A railroad company chartered to construct a railroad between termini on a line crossing another constructed road, has implied power, upon just compensation, to cross its tracks and to connect with it.<sup>69</sup>

*Power to do connecting business.*—A railway may build side tracks to the establishments of large shippers, as a power incidental to its expressly granted powers.<sup>70</sup> And it has been held that a statute empowering a railway company to build "branches of railroads," authorized the construction of a short elevated road from the original terminus of its route along a public landing.<sup>71</sup> So a railway may cart freight from and to its depots.<sup>72</sup> And it may subscribe to secure the permanent location of a State fair upon its line.<sup>73</sup> It may erect telegraph lines along its route, within its right-of-way, by itself, or by contract with a telegraph company which furnishes the railway telegraph facilities in the transaction of its business.<sup>74</sup> And such a contract between a railway company and the telegraph company, providing that the former shall have its telegraphic business conducted free of charge, may stipulate that the latter shall have exclusive use of the right-of-way belonging to the railway, and that the railway company will discourage competition with it.<sup>75</sup> But, in a somewhat similar case,

<sup>66</sup> *Donoran v. Pennsylvania Co.* (1903), 120 Fed. Rep. 215; *Pennsylvania Co. v. City of Chicago* (1899), 181 Ill. 289, 53 L. R. A. 223; *New York, etc. R. R. v. Scovill* (1898), 71 Conn. 136, 42 L. R. A. 157; *Old Colony R. R. v. Tripp* (1888), 147 Mass. 35, 9 Am. St. Rep. 661; *Brown v. New York Central, etc. R. R.* (1894), 75 Hun, 355.

<sup>67</sup> *Express Cases* (1885), 117 U. S. 1.

<sup>68</sup> *Western U. T. Co. v. Chicago, etc. R. R.* (1877), 86 Ill. 246, 29 Am. Rep. 28.

<sup>69</sup> *Morris & E. R. Co. v. Central R. Co.*, 31 N. J. L. 205; *Branson v. City of Philadelphia*, 47 Pa. St. 329; *Western Pa., etc. Appeal*, 99 Pa. St. 155.

<sup>70</sup> *Wilson v. Furness Ry. Co.*, L. R. 9 Eq. 28.

<sup>71</sup> *McAboy's Appeal*, 107 Pa. St. 548.

<sup>72</sup> *Attorney-General v. Grand Trunk Ry. Co.*, 16 Dec. des Trib. (L. C.) 9.

<sup>73</sup> *State Board v. Citizens' Street R. Co.*, 47 Ind. 407.

<sup>74</sup> *Prather v. Western Union Tel. Co.* (1883), 89 Ind. 501; *Western Union Tel. Co. v. Rich* (1878), 19 Kan. 517, 27 Am. Rep. 159.

<sup>75</sup> *Western Union Tel. Co. v. Chicago, etc. R. Co.* (1887), 86 Ill. 246. In this case and in *Western Union Tel. Co. v. Atlantic, etc. Tel. Co.* (1877), 7 Biss. 367, it was practically held that such a grant of exclusive privileges

the exclusive privilege of erecting lines of telegraphic communication along the road, was declared void as in restraint of trade, and contrary to public policy.<sup>76</sup> A railway company may maintain restaurants for its passengers.<sup>77</sup> It may charge for the use of machines for weighing goods at stations.<sup>78</sup> A railroad company can, for the protection of its property, issue a printed circular offering a general standing reward "for the arrest, with proof to convict, of any person for the malicious obstruction of" its tracks, and such offer is binding on the company.<sup>79</sup> And such a company may, out of its funds, give gratuities to servants or directors of the company.<sup>80</sup>

**§ 1038. Location of road and stations. Removal of station.** The discretion of the company in locating its line, in good faith, within the prescribed termini, will not be controlled or reviewed by a court.<sup>81</sup> It will not be allowed to unduly lengthen its line in prejudice to the public, and for private advantage of its officers and other persons.<sup>82</sup> A contract to locate a station at a certain point, with agreement to establish no other station in that vicinity, is contrary to public policy and void.<sup>83</sup> A railroad is not bound to stop, and interchange business with an intersecting railroad at the junction, although it may elsewhere have done so with another intersecting company.<sup>84</sup> A railroad, having built its road, has no power, without express authority, to materially change the location of its line.<sup>85</sup> Where navigable waters intervene in its course, a railroad may be constructed over them, if it may be done without destruction or serious impairment of navigation.<sup>86</sup>

was inoperative to prevent another telegraph line being built along the line of the road, and therefore not contrary to public policy.

<sup>76</sup> Western Union Tel. Co. v. Burlington, etc. Ry. Co., 3 McCrary, 130.

<sup>77</sup> Flanagan v. Great Western Ry. Co., L. R. 7 Eq. 116.

<sup>78</sup> London, etc. Ry. Co. v. Price, 11 Q. B. Div. 485; Browne & Theobald's Railway Law, 97.

<sup>79</sup> Central Railroad & Banking Co. v. Cheatham (1888), 85 Ala. 292; Beach on Railways, § 505.

<sup>80</sup> Hutton v. West Cork Ry. Co., 23 Ch. Div. 654; Brown & Theobald's Railway Law, 97.

<sup>81</sup> Fall River, etc. Co. v. Old Colony, etc. Co., 5 Allen (87 Mass.), 221; Mayor, etc. of Worcester v. Railroad Comm'r, 113 Mass. 161; Walker v. Mad River, etc. Co., 8 Ohio, 38; Parker's Appeal, 64 Pa. St. 137.

<sup>82</sup> Woodstock Iron Co. v. Extension Co., 129 U. S. 643.

<sup>83</sup> Mobile & O. R. Co. v. People, 132 Ill. 559.

<sup>84</sup> Atchison, etc. R. Co. v. Denver, etc. R. Co., 110 U. S. 667.

<sup>85</sup> Erie R. Co. v. Steward, 170 N. Y. 172.

<sup>86</sup> Hamilton v. Vicksburg, etc. R. Co., 34 La. Ann. 970, 31 N. J. Law, 205.

A railway station is as necessary to the railway as railway tracks, and can be located on public property.<sup>87</sup> If public rights are injuriously affected, by the removal of a railway station, the question of convenience or economy to the company will not justify it.<sup>88</sup> Where the owner sells right-of-way, reserving right to mine, he must exercise his reserved right, in a way not to let down the tracks.<sup>89</sup>

**§ 1039. Union depot. Terminal facilities for joint and several use of railroads.**—Where two or more railroad corporations construct and own a union depot, and other terminal facilities for their joint and several use, each company paying its proportionate part of the expense, no profit being involved, they are obliged to allow to new roads upon demand, like use, upon payment of their proper share of expense.<sup>90</sup> Such depot can not be sold or leased except as allowed by statute.<sup>91</sup> Where one of the railroads purchases another, entering the same depot, it will have to pay its share of the depot expense, regardless of the purchase.<sup>92</sup>

**§ 1040. Right of way. Power of eminent domain. Not transferable.**—The right to take property for the uses of the corporation company, extends only to property reasonably necessary for the purposes of the corporation.<sup>93</sup> Thus one railroad may condemn the right of way to cross another railroad. The corporation may take the fee, or whatever interest in the land is necessary for the corporate purposes.<sup>94</sup> Property already devoted to a public use, may, when necessary, be taken for another public use,<sup>95</sup> as the taking by one railroad of the property of another company, already in its use for railroad purposes.<sup>96</sup> Although a railroad corporation has exercised its right of eminent domain, in locating its line and stations, it may make any further appropriation of land for additional necessities in the operation of its road as authorized by its charter.<sup>97</sup> The most frequent exercise of

<sup>87</sup> Capdeville v. New Orleans, etc. Co. (La. 1903), 34 South. 868.

cago, etc. Ry. (1898), 89 Fed. Rep. 648.

<sup>88</sup> State v. Northern Pac. Ry. Co. (Minn. 1903), 96 N. W. 81.

<sup>93</sup> Chicago, etc. Co. v. Dunbar, 100 Ill. 110.

<sup>89</sup> Silver Springs, etc. Co. v. Van Ness (Fla. 1903), 34 So. 884.

<sup>94</sup> Long Island R. R. Co. v. Garvey, 159 N. Y. 334.

<sup>90</sup> St. Paul, etc. Co. v. Minnesota, etc. R. R. (1891), 47 Minn. 154, 13 L. R. A. 415.

<sup>95</sup> New York, etc. R. Co. v. Boston, etc. R. Co., 36 Conn. 196.

<sup>91</sup> Earle v. Seattle, etc. Ry. Co. (1893), 56 Fed. Rep. 909.

<sup>96</sup> Lake Shore, etc. Co. v. Chicago, etc. Co., 97 Ill. 506.

<sup>92</sup> St. Joseph, etc. Co. v. Chi-

<sup>97</sup> Fisher v. Chicago, etc. Ry. Co., 140 Ill. 323.

the power of eminent domain occurs in the condemnation of private property for right-of-way of railroads, and for their stations, and terminal facilities. Railroads being common carriers, their use of property is a public one. Railroad franchises must be exercised alone by the corporation to which they are granted.<sup>98</sup> One railroad may condemn the right of way to cross another railroad.<sup>99</sup>

**§ 1041. Power of railroads to purchase and sell lands and other property.**—The consideration for which a railroad company is granted its corporate franchises, is that the powers and privileges granted may be exercised for the public good. The corporation therefore will not be allowed, without express legislative authority, to transfer to others, those rights and powers, and relieve itself of the duties and burdens they impose. Therefore, without such authority, it cannot sell, mortgage,<sup>1</sup> or lease,<sup>2</sup> its entire property or its franchises to another corporation, or individual, or consolidate with another corporation.<sup>3</sup> Of the rule in New York, the court said: “Whatever may be the rule in other States, or in England, the public policy of this State, as manifested by numerous acts of the legislature, has always been, not only to afford the fullest scope for the consolidation and reorganization of non-competing railroads and railroad corporations, but also for the transfer of the use of such roads and their franchises, by one corporation to another.”<sup>4</sup> Under incorporation to construct a road between certain points, a company may purchase a railroad already existing between those termini.<sup>5</sup> By the purchase by one corporation of all the property of another, and purchase and payment to the shareholders for all the stock, the vendor corporation is entitled to the proceeds of all the property.<sup>6</sup> In case of mortgage of a contract by a city with a waterworks company, and

<sup>98</sup> Ulmer v. Lime Rock R. Co. (1904), 57 Atl. 1001, 98 Me. 579.

<sup>99</sup> National Docks, etc. R. R. v. State (1891), 50 N. J. L. 217.

<sup>1</sup> Branch v. Jessup, 106 U. S. 468.

<sup>2</sup> Oregon Railroad Co. v. Oregonian Ry. Co., 130 U. S. 1; Central, etc. Co. v. Pullman's etc. Co., 139 U. S. 24.

<sup>3</sup> Archer v. Terre Haute, etc. Co., 102 Ill. 493.

<sup>4</sup> Ruger, Ch. J., in Woodruff v. Erie Ry. Co., 93 N. Y. 609.

<sup>5</sup> Arkansas, etc. R. R. v. St. Louis, etc. R. R. (1900), 103 Fed. Rep. 747; Branch v. Jesup (1882), 106 U. S. 468; Camden, etc. R. R. v. May's Landing, etc. R. R. (1886), 48 N. J. L. 530; People v. Brooklyn, etc. R. R. (1882), 89 N. Y. 75; City of Lincoln v. Lincoln St. Ry. (Neb. 1903), 93 N. W. Rep. 766.

<sup>6</sup> Pendery v. Carleton (1898), 87 Fed. Rep. 41.

sale in foreclosure, the purchaser at the sale may sell it to a foreign corporation, and it may enforce the contract.<sup>7</sup> If the railroad charter prohibits the corporation from making a sale of its property, that does not prevent a sale on account of its creditors.<sup>8</sup> Power to mortgage gives no power to sell, nor is such power given by power to consolidate, though provided that upon consolidation all property and rights should vest in the company so empowered to consolidate.<sup>9</sup> Only the State can object that a foreign railroad company has purchased, at the sale, a domestic railroad.<sup>10</sup> The purchaser at a foreclosure sale of the property and franchises of a railroad, may transfer them to a new corporation. And such purchaser may be a foreign corporation, unless forbidden by statute.<sup>11</sup> Power to a railroad corporation to purchase, gives power by necessary implication to other railroads to sell.<sup>12</sup> If, under general statute, existing at the time of the organization of the railroad corporation, it is empowered to sell or lease or consolidate its railway with another, the power is to be exercised by the directors as a board, and the stockholders are bound by the action of the board. Dissenting stockholders have no remedy, except in case of fraud clearly shown.<sup>13</sup> A railroad corporation, as purchaser of the railroad of another company, is not bound by its outstanding contracts.<sup>14</sup> A railroad with power to construct branches, may purchase branch lines.<sup>15</sup>

**§ 1042. Power to lease, sell, or consolidate.**—The power expressly given to a railroad company, to buy or consolidate with, or take lease for another railroad, gives the other company the power to sell or consolidate, or make lease.<sup>16</sup> Any sale, lease or consoli-

<sup>7</sup> State v. Topeka, etc. Co. (Kan. 1900), 60 Fed. Rep. 337.

<sup>8</sup> Simmons v. Worthington (1898), 170 Mass. 203.

<sup>9</sup> Southern Pacific Ry. v. Esquibel (1889), 4 N. M. 337, 20 Pac. 109.

<sup>10</sup> Rothschild v. Memphis, etc. R. R. (1902), 113 Fed. Rep. 476.

<sup>11</sup> Parker v. Elmira, etc. R. R. (1901), 165 N. Y. 274; Central Trust Co. v. Western, etc. R. R. (1898), 89 Fed. Rep. 24; Julian v.

Central T. Co. (1902), 115 Fed. Rep. 956; Pittsburgh, etc. Ry. v. Keokuk, etc. Bridge Co. (1889), 131 U. S. 371.

<sup>12</sup> Louisville, etc. R. R. v. Ken-

tucky (1896), 161 U. S. 677; Knoxville v. Knoxville, etc. R. R. (1884), 22 Fed. Rep. 758.

<sup>13</sup> Middleton v. Boston, etc. R. R. (1885), 53 Conn. 351; Mayfield v. Alton, etc. Co. (Ill. 1902), 65 N. E. Rep. 100.

<sup>14</sup> Hoard v. Chesapeake, etc. Ry. (1887), 123 U. S. 222; Wallace v. Ann Arbor, etc. Ry. (1899), 121 Mich. 588; Dallas v. Maddox (Tex. 1895), 31 S. W. Rep. 709, 31 S. W. 702.

<sup>15</sup> Central T. Co. v. Washington Co. (1903), 124 Fed. 813.

<sup>16</sup> Louisville, etc. R. R. v. Kentucky (1896), 161 U. S. 677.

dation unauthorized at the time of the creation of the railroad corporation, but which is afterward authorized by amendment of the charter or by general statute, requires consent of all the shareholders.<sup>17</sup> But where the charter was issued under reserved power of the legislature to amend, the weight of authority holds that a dissenting stockholder is powerless to arrest any such sale, lease or consolidation.<sup>18</sup> The legislature by statute may provide for appraisal and condemnation of the shares of any stockholder rightfully dissenting from any such sale or consolidation.<sup>19</sup> Where, by agreement, one railroad corporation gives to another the joint use of some of its tracks on payment of rental and proportionate operating expenses, each road running its own trains by its own employes, the transaction is a lease and not a merger of corporate business of the companies.<sup>20</sup> A lease by one railroad company of its road to another company, with right of perpetual renewal, is illegal.<sup>21</sup> A lease for nine hundred and ninety-nine years is illegal, but if the power to lease exists, such a lease may be made, though it is practically a sale.<sup>22</sup> The State may compel a railroad to operate a part of its line, though that part has been leased to another company which will thereby be released from paying the rental.<sup>23</sup> A lease by a railroad corporation of its railroad to a foreign corporation, to effect a combine in transportation of coal, and to destroy competition in the business of coal mining, is illegal.<sup>24</sup> The power to pool business, in the interchange by railroads, of passenger and freight traffic over each other's lines, gives no power to lease.<sup>25</sup> Without consent of the legislature, a railroad can not release itself from its duties to the public by a lease of its road.<sup>26</sup> Power to take a lease gives cor-

<sup>17</sup> Earle v. Seattle, etc. Ry. (1893), 56 Fed. Rep. 909; Alexander v. Atlanta, etc. R. R. Co. (1899), 108 Ga. 151.

<sup>18</sup> Market Street Ry. v. Hellman (1895), 109 Cal. 571; Hale v. Cheshire R. R. (1894), 161 Mass. 443.

<sup>19</sup> Pittsburgh, etc. Ry. v. Garrett (1893), 50 Ohio St. 405; Gregg v. Northern R. R. (1893), 67 N. H. 452; Boston, etc. R. R. v. Graham (1901), 179 Mass. 62; Whiton v. Batchelder, etc. Corp. (1901), 179 Mass. 169.

<sup>20</sup> Central Trust Co. v. Colorado,

etc. Ry. Co. (1898), 89 Fed. Rep. 560.

<sup>21</sup> St. Louis, etc. R. R. v. Terre Haute, etc. R. R. (1892), 145 U. S. 393.

<sup>22</sup> Dickinson v. Consolidated, etc. Co. (1903), 119 Fed. Rep. 871.

<sup>23</sup> State v. Iowa Central Ry. (1891), 83 Iowa, 720.

<sup>24</sup> Stockton v. Central R. R. (1892), 50 N. J. Eq. 52, 17 L. R. A. 97.

<sup>25</sup> Thomas v. Railroad Co. (1879), 101 U. S. 71.

<sup>26</sup> Durfee v. Johnston, etc. R. R. (1893), 71 Hun, 279.

responding power to make a lease.<sup>27</sup> Where the power is given the corporation to lease, without provision as to the mode, the directors may make the lease without direction by the stockholders, and they are bound by it.<sup>28</sup> Where a railroad corporation is authorized to lease its railroad, it is not liable for the negligence of the lessee in its management, unless expressly made so by statute.<sup>29</sup> Lease by a car manufacturing company of all its property to another corporation, with agreement to discontinue manufacturing, is invalid.<sup>30</sup> Where a railway corporation permits another the joint use of its tracks; it is liable for accidents and injuries caused by the negligence of such other company.<sup>31</sup> It was held that an action could not be maintained against a corporation upon a contract which recited that the corporation agreed to pay a certain sum as brokerage for leasing a hotel, the contract being signed in the corporate name by "J. C. M., secretary and treasurer," there being no proof of his authority to sign the instrument, or to bind the corporation, or of any ratification of his act by the corporation.<sup>32</sup>

**§ 1043. Consolidation of railroads.**—There is no implied power in a railroad corporation to lease or sell its properties, or to consolidate with another corporation. For that purpose express legislative authority is requisite. Most of the States confer and regulate this power by statute. By sale, lease, or consolidation, the extensive systems of transcontinental railways are rapidly absorbing short lines, and weaker systems indicating in the United States the ultimate control by one system. It may be that a great consolidated corporation or a few systems can be held under stricter governmental control and responsibility to the law, than is practicable with a multitude of smaller and conflicting corporations. Mr. Justice Brewer of the United States Supreme Court said upon this subject: "It may be true, as contended,—and, not disturbed by the common hue and cry about monopoly, I am dis-

<sup>27</sup> Smith v. Reading Pass Ry. (1893), 24 Pa. Dist. 490; Pinkerton v. Pennsylvania, etc. (1899), 193 Pa. St. 229.

<sup>28</sup> Flagg v. Manhattan Ry. (1881), 10 Fed. Rep. 413.

<sup>29</sup> Pinkerton v. Pennsylvania, etc. Co. (1899), 193 Pa. St. 229; Hayes v. Northern Pacific R. R. (1896), 74 Fed. Rep. 279; Hukell v. Maysville, etc. R. R. (1896), 72 Fed. Rep. 745; Caruthers v. Kan-

sas City, etc. Co. (1898), 59 Kan. 629, 44 L. R. A. 737; Cain v. Syracuse, etc. R. R. (1898), 27 N. Y. App. Div. 376.

<sup>30</sup> Central Transportation Co. v. Pullman, etc. Co. (1891), 139 U. S. 24.

<sup>31</sup> Pennsylvania Co. v. Ellett (1890), 132 Ill. 654.

<sup>32</sup> Greene v. Iroquois, etc. Co. (1903), 84 N. Y. S. 591.

posed to believe that it is true,—that the real interests of the public are subserved by the consolidation of the various transportation systems, and that the putting into the hands and under the control of one corporation, the telegraphic business of the country would secure to the public cheaper and better service.”<sup>33</sup> Consolidation dissolves the consolidating corporations and creates a new one. The effect upon the old corporations is the loss to them of any exemptions and other special privileges they may have enjoyed under the charter.<sup>34</sup> The new corporation is subject to existing laws, and subject to any change made in the constitution subsequent to the creation of the constituent companies.<sup>35</sup> The new corporation succeeds to the property of the component corporations, but subject to their obligations, to the extent of all the property received.<sup>36</sup> There is no consolidation where a railroad corporation transfers its property to another corporation, in consideration of the issue of its stock to the shareholders of the vendor corporation.<sup>37</sup> “Two or more railroad companies whose railways form a continuous line, may enter into a joint agreement, operate their roads as one line, and become liable jointly for moneys borrowed to be used in furtherance of the business of such line.”<sup>38</sup> A consolidation of railways, without statutory authority, is void, and the consolidated company is not even a *de facto* company.<sup>39</sup> Power to purchase gives power to consolidate.<sup>40</sup> No mechanical “connection” is essential to constitute a “connecting road,” or “continuous route.” It is only necessary that they connect at the point of intersection in a way for efficient interchange of traffic.<sup>41</sup> The connecting road need not be at the terminus.<sup>42</sup> The connecting line may be an intersecting

<sup>33</sup> United States v. Western Union T. Co. (1892), 50 Fed. Rep. 28.

<sup>34</sup> Keokuk, etc. R. R. v. Missouri (1894), 152 U. S. 301; Norfolk, etc. R. R. v. Pendleton (1895), 156 U. S. 667, 187 U. S. 258; Yazoo, etc. Ry. v. Adams (1901), 180 U. S. 1; Chicago v. Ashling (1895), 160 Ill. 373.

<sup>35</sup> Smith v. Lake Shore, etc. Ry. (1897), 114 Mich. 460.

<sup>36</sup> Morrison v. American Snuff Co. (1901), 79 Miss. 330, 89 Am. St. Rep. 598.

<sup>37</sup> United States, etc. Co. v.

Isaac's (1899), 23 Ind. App. 533; Chicago, etc. Ry. v. Ashling 8 L. R. A. 858.

<sup>38</sup> Snell v. Chicago, 133 Ill. 413, 8 L. R. A. 856.

<sup>39</sup> American L. & T. Co. v. Minnesota, etc. R. R. (1896), 157 Ill. 641.

<sup>40</sup> Continental Trust Co. v. Toledo, etc. R. R. (1897), 82 Fed. Rep. 642.

<sup>41</sup> Hamilton v. Clarion, etc. R. R. (1891), 144 Pa. St. 34, 13 L. R. A. 779.

<sup>42</sup> Hancock v. Louisville, etc. R. R. (1892), 145 U. S. 409.

line.<sup>43</sup> A distinguishing difference in the effect of sale, from that of consolidation, is that the purchaser of the corporate property is not liable to creditors of the vendor company upon its obligations, but the consolidated corporation is liable to creditors upon the obligations of the constituent corporations.<sup>44</sup>

**§ 1044. Power to lease the corporate franchise.**—A railroad, (and probably no other company having public duties to perform,) can lease its franchises, without the special sanction of the legislature.<sup>45</sup> The matter is thus authoritatively stated by Justice Miller, in the latest decided case in the federal court of last resort: Unless specially authorized by its charter, or aided by some other legislative action, a railroad company can not, by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers, nor can any other railroad company without similar authority make a contract to receive and operate such road, franchises, and property of the first corporation, and such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grant of powers in a railroad charter.<sup>46</sup> This statement of the law does not seem to accord with the fact, that railroads almost without exception are either leased, or hold leases of other roads. Frequently has the power of the legislature been exercised, to avoid the common law rule. In New York, for example, what-

<sup>43</sup> Wallace v. Long Island R. R. (1877), 12 Hun, 460.

<sup>44</sup> Tompkins v. Augusta, etc. R. R. (1897), 102 Ga. 436, 30 S. E. 992; Langhorne v. Richmond, etc. Ry. (1895), 91 Va. 369, 22 S. E. 357; *Re Utica*, etc. Co. (1897), 154 N. Y. 268; Berry v. Kansas City, etc. R. R. (1894), 52 Kan. 774, 39 Am. St. Rep. 381; Jones on Corp. Bonds, §§ 364, 365.

<sup>45</sup> Thomas v. West Jersey R. Co., 111 U. S. 71; Oregon & Nav. Co. v. Oregonian Ry. Co., 130 U. S. 1; Coe v. Columbus, etc. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Thomas v. The Railroad, 101 U. S. 71; Abbott v. Johnstown, etc. R. Co., 80 N. Y. 27, 36 Am. Rep. 572; Troy, etc. R. Co. v. Boston, etc. R. Co., 86 N. Y. 107; Woodruff v. Erie R. Co., 25 Hun, 246; Pitts-

burg, etc. R. Co. v. Bedford, etc. R. Co., 81 Pa. St. Supp. 104; Archer v. Terre Haute, etc. R. Co., 102 Ill. 493; Hinckley v. Gildersleeve, 19 Grant (U. C.), 212; Attorney-General v. Niagara Falls, etc. Co., 20 Grant (U. C.), 34.

<sup>46</sup> Pennsylvania R. Co. v. St. Louis, etc. R. Co., 118 U. S. 290, 309. Similar language was used in State v. Atchison, etc. R. Co. (1888), 24 Neb. 143, 4 Ry. & Corp. L. J. 86, 91, citing Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 290, and Thomas v. The Railroad, 101 U. S. 71. *Acc. East Anglian Ry. Cos. v. Eastern Counties Ry. Co.*, 11 C. B. 775, 21 L. J. C. P. 23; *Great Northern Ry. Co. v. Eastern Counties Ry. Co.*, 9 Hare, 306; *Beman v. Ruford*, 1 Sim. N. S. 550.

ever may be the rule in other States or in England, the public policy of the State, as manifested by numerous acts of the legislature, has always been, not only to afford the fullest scope for the consolidation and reorganization of non-competing railroads and railroad corporations, but also for the transfer of the use of such roads and their franchises by one corporation to another.<sup>47</sup> And, in other States, general laws regarding leases of railways would seem to have been desirable, and have long existed.<sup>48</sup> A lease of a railroad for ten years to two individuals, the superintendent and general manager of the road, with authority to operate the road and to charge for carrying upon it, while not involving the essential franchise of the company to be a corporation, comes within the meaning of a prohibition to make a contract involving the franchise of the road, except in a certain way.<sup>49</sup> A lease or sale of franchises unauthorized by charter or statute, is not only an *ultra vires* act with respect to dissenting shareholders of the company, but it is also such an excess of its corporate powers as renders the company liable to forfeiture of charter at the instance of the State.<sup>50</sup>

**§ 1045. Construction of statutory authority to lease.**—Without express legislative authority a railroad corporation has no power to lease its line.<sup>51</sup> A statute authorizing the lease of a railroad will not by implication authorize such lease by the directors against a minority of dissenting stockholders, so far as their interests are affected thereby.<sup>52</sup> An act providing that railroads may consolidate, does not authorize a lease by one company to another.<sup>53</sup> The section of the constitution of Texas which provides that no railroad corporation, nor the lessees of such portion, shall consolidate with any other parallel or competing line,

<sup>47</sup> Woodruff v. Erie Ry. Co., 93 N. Y. 609, 618. See § 369, *infra*.

<sup>48</sup> See Vermont, etc. R. Co. v. Vermont Cent. R. Co., 34 Vt. 2, 49. In England it is enacted that no railway company shall grant or accept a lease or transfer of any railway unless under a distinct provision of an act specifying the parties. 8 & 9 Vic. ch. 96,

<sup>49</sup> Stevens v. Davison (1868), 18 Grat. 827.

<sup>50</sup> Pennsylvania R. Co. v. St. Louis, etc. Ry. Co., 118 U. S. 290; Thomas v. The Railroad, 101 U. S. 71; Troy, etc. R. Co. v. Boston,

etc. Ry. Co., 86 N. Y. 107; Abbott v. Johnston, etc. R. Co., 80 N. Y. 27, 36 Am. Rep. 572; People v. Albany, etc. R. Co., 77 N. Y. 232.

<sup>51</sup> Thomas v. Railroad Co. (1879), 101 U. S. 71, is the leading case upon the construction of the requirement of statutory authority to lease.

<sup>52</sup> Mills v. Central R. Co. (1886), 41 N. J. Eq. 1.

<sup>53</sup> Mills v. Central R. Co. (1886), 41 N. J. Eq. 1, 7. See Archer v. Terre Haute, etc. R. Co., 102 Ill. 493, 7 Am. & Eng. R. Cas. 249.

is a restriction upon the power of such corporations, and is not to be construed as a grant of authority to lease.<sup>54</sup> Power to consolidate is power to take in a partner or to go in as a partner, while power to lease is power to dispose of the whole concern to a stranger. In a consolidation, the stockholders of the respective companies retain, to a certain extent, control of their corporate property, but, by a lease, the stockholders of the leasing company part with this control of their corporate property, hand it over to others, and abandon their enterprise.<sup>55</sup> Statutes authorizing railway companies to lease their roads, must be strictly complied with, or the lease will be invalid, after all.<sup>56</sup> Where the power to make a lease is vested in the shareholders of the company, the directors can not radically modify its terms and conditions.<sup>57</sup> A grant of power to two corporations to consolidate or merge their property and franchises, confers no power to lease them.<sup>58</sup> And power granted to lease or sell to a particular person or corporation, will not support a lease or sale to any other person or corporation.<sup>59</sup> A railroad corporation authorized to sell or lease its completed road, can not transfer its right to construct a road.<sup>60</sup> Under authority to sell or lease its property, it can not transfer its franchises.<sup>61</sup> Although a statutory provision requires the written consent of the stockholders to a lease of a road, the stockholders may be estopped by laches from pleading the illegality of the proceedings.<sup>62</sup> Dissenting shareholders may restrain an

<sup>54</sup> Central, etc. R. Co. v. Morris (1887), 68 Tex. 49, 59; Abbott v. Horse Car Co., 80 N. Y. 27.

<sup>55</sup> Mills v. Central R. Co. (1886), 41 N. J. Eq. 1, 7.

<sup>56</sup> Wood's Ry. Law, 1686; Peters v. Lincoln, etc. R. R. Co., 14 Fed. Rep. 319, where a two-thirds vote of the stockholders was required; Kent Coast Ry. Co. v. London, etc. Ry. Co., L. R. 3 Ch. App. Cas. 656, where it was held that where an act authorizes a lease of the company's property to another company upon the certificate of the board of trade being obtained, no lease can be valid before the certificate has been obtained, and mere reference in subsequent acts of parliament to an agreement for a lease which has been entered into, will not make the agreement valid.

<sup>57</sup> Metropolitan Elevated Ry. Co. v. Manhattan Elevated Ry. Co. (N. Y. 1884), 14 Abb. N. Cas. 103, 235, 15 Am. & Eng. Ry. Cas. 51. See also Harkness v. Manhattan Elevated Ry. Co., N. Y. Daily Reg. Oct. 8, 1886. Cf. People v. Metropolitan Elevated Ry. Co., 26 Hun, 84.

<sup>58</sup> Mills v. Central R. Co., 41 N. J. Eq. 1; Archer v. Terre Haute, etc. R. Co., 102 Ill. 493.

<sup>59</sup> Bird v. Bird's, etc. Co., 9 Ch. App. 358.

<sup>60</sup> Clarke v. Omaha, etc. Co., 4 Neb. 458.

<sup>61</sup> Pullman v. Cincinnati, etc. Co., 4 Biss. 35; Joy v. Jackson, etc. Co., 11 Mich. 155.

<sup>62</sup> St. Louis, etc. R. Co. v. Terre Haute R. Co., 33 Fed. Rep. 440.

unauthorized lease, as they may other *ultra vires* acts.<sup>63</sup> But a delay of three months is not laches.<sup>64</sup> Where there is no legislative authority for ascertaining the damage inflicted upon the dissenting stockholders by the majority diverting their vested rights by an illegal lease, and for awarding them compensation therefor, the court will not assume that function, but will annul the lease and restore complainants to their position before those rights were invaded, regardless of the effects of such action upon the lessee.<sup>65</sup>

**§ 1046. Liability of the lessor.**—A railway company can not lease the right to use its road, so as to absolve itself from its duties to the public.<sup>66</sup> It is the accepted doctrine in this country, that a railroad corporation can not escape the performance of any duty or obligation imposed by its charter or the general laws of the State, by a voluntary surrender of its road into the hands of lessees.<sup>67</sup> Further, a railroad company, chartered under the laws of Virginia, can not, by the voluntary surrender of the possession, control and operation of its road, by deed of trust to trustees of its own selection, shift the responsibilities imposed upon it by law; nor relieve itself from liability for wrongs or injuries subsequently done to persons or to property in the negligent operation of its road.<sup>68</sup> The lessor continues to be liable for all acts done by the lessee in operating the road, whether the cause of action be *ex delicto* or *ex contractu*, and therefore is liable for goods received by its line for carriage and not deliv-

<sup>63</sup> Pond v. Vermont, etc. R. Co., 12 Blatchf. 280; Tippecanoe County v. Lafayette, etc. R. Co., 50 Ind. 85.

<sup>64</sup> Mills v. Central R. Co. (1886), 41 N. J. Eq. 1.

<sup>65</sup> Mills v. Central R. Co. (1886), 41 N. J. Eq. 1.

<sup>66</sup> As to make remuneration for personal injuries to a passenger on the road. International, etc. R. Co. v. Eckford (1888), 71 Tex. 274, following Railroad Co. v. Morris (1888), 68 Tex. 59; Freeman v. Minneapolis, etc. R. Co. (1881), 28 Minn. 443; Lakin v. Willamette, etc. R. Co. (1886), 13 Oregon, 436; Ricketts v. Chesapeake, etc. R. Co. (W. Va. 1890), 7 Ry. Corp. L. J. 357, citing Pennsylvania R. Co. v. St. Louis, etc.

R. Co., 118 U. S. 309; Thomas v. The Railroad, 101 U. S. 71; Transportation Co. v. Ullman, 89 Ill. 244; Illinois Central R. Co. v. Barron, 5 Wall. 90; Abbott v. Johnstown, etc. R. Co., 80 N. Y. 27, 36 Am. Rep. 572; Nelson v. Vermont, etc. R. Co., 26 Vt. 717, 62 Am. Dec. 614; Chicago, etc. R. Co. v. Whipple, 22 Ill. 105; Chicago, etc. R. Co. v. McCarthy, 20 Ill. 385, 71 Am. Dec. 285; Ohio, etc. R. Co. v. Dunbar, 20 Ill. 623, 71 Am. Dec. 291.

<sup>67</sup> Railroad Co. v. Brown, 17 Wall. 450.

<sup>68</sup> Acker v. Alexandria, etc. R. Co. (1888), 84 Va. 648; Naglee v. Alexandria, etc. R. Co. (1887), 83 Va. 707.

ered.<sup>69</sup> And this is so, although the charter of the former authorizes it to lease its road.<sup>70</sup> A company making a lease without legal authority, subjects itself to liability for the torts of its lessee committed in the operation of the leased road.<sup>71</sup> This, however, does not seem to be different from the prevailing doctrine in cases where leases are authorized. A railway company executing a lease to another company of the exclusive use of its track and rolling stock for ninety-nine years, which is confirmed by the

<sup>69</sup> National Bank of Chester v. Atlanta, etc. Ry. Co. (1886), 25 S. C. 216; Harmon v. Columbia, etc. R. Co. (1888), 28 S. C. 401.

<sup>70</sup> Harmon v. Columbia, etc. R. Co. (1888), 28 S. C. 401; McIver, J., thus reasons: The circuit judge seems to rest his conclusion upon the ground that inasmuch as, under the charter of the defendant company, it has power to lease its road, it follows necessarily that when the road is leased the company is released from all its obligations to the public and to individuals, and these obligations then vest solely upon the lessee. We can not accept this view. It rests upon the idea that inasmuch as the defendant company incurs these obligations in exchange, as it were, for the charter rights and privileges conferred by the legislature, when such rights and privileges are transferred to another by consent of the legislature, the corresponding obligations are likewise transferred to such other person or corporation. This at first view seems plausible, and is the view adopted in some of the states. But it rests upon the unfounded assumption that the defendant company has transferred all of its chartered rights and privileges to the Richmond & Danville Railroad Company. We understand the testimony as tending to show, and the concession of counsel to be simply that the defendant company has leased its road to the Richmond & Danville Railroad Company, and not that

it has transferred all its chartered rights and privileges to that company. On the contrary, this very case necessarily implies that the defendant still maintains its corporate organization and existence; and instead of running its road itself directly, has bargained with another company to run it for a compensation, as we suppose. The defendant company, therefore, in reality still enjoys the benefits of its charter and can not be permitted to escape its corresponding obligations. What would be the effect of an absolute transfer of all its chartered rights and privileges by a sale made under proper authority is not the question before us. The fact, therefore, that the defendant company is authorized by its charter "to farm out" or lease its road to another company, and that it has done so, does not exempt it from responsibility, in the absence of any provision granting such exemption; and there is no such exemption in defendant's charter."

<sup>71</sup> York, etc. R. Co. v. Winans, 17 How. 301; Alexandria, etc. R. Co. v. Brown, 17 Wall. 445; Abbott v. Johnston, etc. R. Co., 80 N. Y. 27, 36 Am. Rep. 572; Macon, etc. R. Co. v. Mayes, 49 Ga. 355, 15 Am. Rep. 678; Nelson v. Vermont, etc. R. Co., 26 Vt. 717, 62 Am. Dec. 614; Mahoney v. Atlantic, etc. R. Co., 63 Me. 68; Chicago, etc. R. Co. v. Whipple, 22 Ill. 105. Cf. Woodruff v. Erie Ry. Co., 93 N. Y. 609.

legislature, will still be liable for the destruction of property by fire, caused by a neglect on the part of the lessee company to keep its track clear of all inflammable matter, notwithstanding the legislature may have conferred upon such lessee corporation all the powers of the lessor. There being no clause of exemption in such act of the legislature, the liability of the lessor will remain.<sup>72</sup> And both lessor and lessee are liable under a like statute for such an injury.<sup>73</sup> The original obligation can only be discharged by a legislative enactment, consenting to and authorizing the lease, with an exemption granted to the lessor company.<sup>74</sup>

**§ 1047. Line between liability of lessor and lessee.**—When a railway is leased, under a statute expressly providing that the lessor shall not be exonerated from any duties or liabilities imposed by its charter, the lessee and not the lessor is liable for torts; as, for example, to a passenger injured by an assault and wrongful expulsion from its train by one of the lessee's servants.<sup>75</sup> So it has been said that an authorized lease, even without any exemption clause, absolves the lessor from the torts of the lessee, resulting from the negligent operation and handling of its trains, and the general management of the leased road over which the lessor can have no control. But for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station houses, etc., the charter company can not, in the absence of statutory exemption, discharge itself of legal responsibility.<sup>76</sup> The distinction is stated by Judge

<sup>72</sup> *Balsley v. St. Louis, etc. R. Co.* (1886), 119 Ill. 68; *Pratt v. Atlantic, etc. R. Co.*, 42 Me. 579; *Stearns v. Atlantic, etc. R. Co.*, 46 Me. 95.

<sup>73</sup> *Ingersoll v. Stockbridge, etc. R. Co.*, 8 Allen, 438; *Davis v. Providence, etc. R. Co.*, 121 Mass. 134. It is the same when the lease was without special authority from the state. Both companies are liable to the owner of the stock—the one because of its actual operation of the road; and the other because it could not, without permission of the legislature, transfer its franchise even temporarily so as to release itself from liability for the acts and defaults of its lessee. International,

*etc. Ry. Co. v. Dunham* (1887), 68 Tex. 231.

<sup>74</sup> *Singleton v. Southwestern Ry. Co.*, 70 Ga. 464.

<sup>75</sup> *Mahoney v. Atlantic, etc. R. Co.*, 63 Me. 68, by a divided court. But in *Braslin v. Somerville, etc. R. Co.* (1887), 145 Mass. 64, this case was not followed, and the lessor was held liable in not unlike circumstances.

<sup>76</sup> *Nugent v. Boston, etc. R. Co.* (1888), 80 Me. 62, holding that when a railroad corporation leases its road by virtue of a legislative enactment containing no provision exempting it from liability, the lessor is liable for a personal injury which resulted solely from the original defective

Brewer to be, that if the injury results from negligence in the handling of trains, or in the omission of any statutory duty connected with the management of the road, matters in respect of which the lessor company could in the nature of things have no control; then the lessee company will alone be responsible; but when the injury results from the omission of some duty which the lessor itself owes to the public in the first instance—something connected with the building of the road—then the company assuming the franchise can not divest itself of responsibility by leasing its track to some other company.<sup>77</sup> This seems to be as far as principle can extend the lessor's liability, and it appears to be settled that the lessee is liable for injuries inflicted through the negligence of its employes in the management of trains.<sup>78</sup> It seems a matter of course, however, that if the road be operated under the name of the lessor, the latter will be liable.<sup>79</sup>

**§ 1048. Liability of the lessee.**—A railway can not, without express statutory authority, divest itself of its franchise, or delegate to others the performance of that duty which the legislature has imposed upon it. But if a railway, under due authority of law, has leased its line to another railway, the lessor railway is not liable for torts committed by the lessee railway in the operation of the line.<sup>80</sup> The lessee is liable for any injuries after

construction of its station house, though the lessee had long been in full possession and control under the lease, and had covenanted therein to maintain the station houses in as good order as they were in at the date of the lease. The same rule has been followed in respect of cattle guards omitted in the original construction of the road. *Cook v. Milwaukee, etc. R. Co.* (1874), 36 Wis. 45; *St. Louis, etc. R. Co. v. Curl* (1882), 28 Kan. 622.

<sup>77</sup> *St. Louis, etc. Co. v. Curl* (1882), 28 Kan. 622.

<sup>78</sup> *Davis v. Providence, etc. R. Co.*, 121 Mass. 134; *Hall v. Brown*, 54 N. H. 495. But *Peoria, etc. R. Co. v. Lane*, 83 Ill. 448, is *contra*, agreeing with the decisions in the last section.

<sup>79</sup> *Bower v. B. & S. W. R. Co.*, 42 Iowa, 546. In a case where consolidation had been attempted

by means of an unauthorized lease it was held that the lessor company was not in a state of quiescence or torpor, but that instead of managing its road alone, it operated it in conjunction with others; and that, accordingly, it remained liable for injuries caused by those whom it had associated with itself in the operation and management of its property. *Latham v. Boston, etc. Ry. Co.*; 38 Hun, 265, citing *Abbott v. Johnstown, etc. Horse R. Co.*, 80 N. Y. 27, 36 Am. Rep. 572.

<sup>80</sup> *Virginia Midland Ry. Co. v. Washington* (Va. 1890), 7 Ry. & Corp. L. J. 353, holding that a railroad company which has, under authority of the legislature, leased its road, and transferred the exclusive possession and control thereof to another company, can not be held liable for injuries thereon, sustained by a servant of

it enters into possession, arising from its failure to keep the property in repair, as, for example, its own failure to keep the tracks in good condition.<sup>81</sup> The lease, under due authority of law, effects a transfer of rights and liabilities in its management, so that the corporation owning the railroad is discharged from responsibility for the lessee's torts.<sup>82</sup> The lessee company, for the purposes of the lease, becomes, *pro hac vice*, the owner of the road, and while the lessees operate the road under their lease, the lessors are not liable, under their charter, or the statutes of the State, for an injury sustained thereon, by a passenger, caused by the wrongful acts of the agents or servants of the lessees towards him; nor is there, in such case, any privity, either of contract, or by implication of law, between the passenger and the lessors, as common carriers of passengers, by which they are rendered liable for such an injury. The remedy of the passenger for an injury thus caused, is against the lessees who have the exclusive use, care, direction, and control of the road, and with whom alone the passenger contracts.<sup>83</sup> The lessee company is not, however, liable for the torts of the lessor committed prior to its taking possession of the property, nor for such injuries to property and person occurring after possession, as are occasioned by the fault of the lessor.<sup>84</sup> Statutes imposing police and other duties and liabilities

the lessee, by reason of the lessee's negligence. *Acc. Railroad Co. v. Morris*, 63 Tex. 59. If the circumstances are such as to render the lessee liable for torts, it can not plead by way of defense that the lease was *ultra vires* of the lessor company. *McCleur v. Manchester, etc. R. Co.*, 13 Gray, 124, 74 Am. Dec. 624; *Beach on Railways*, § 569; *Doolan v. Midland Ry. Co.*, L. R. 2 App. Cas. 792.

<sup>81</sup> *Hoff v. Minneapolis, etc. R. Co.*, 14 Fed. Rep. 558; *Wasmer v. Delaware, etc. R. Co.*, 80 N. Y. 312; *Philadelphia, etc. R. Co. v. Anderson* (1880), 94 Penn. St. 351, 39 Am. Rep. 787; *Beach on Railways*, § 569.

<sup>82</sup> *Virginia Midland Ry. Co. v. Washington* (Va. 1890), 7 Ry. & Corp. L. J. 353, citing *Pierce on Railroads*, 283; *Mahoney v. Railroad Co.*, 63 Me. 68; *Ditchett v. Railroad Co.*, 67 N. Y. 425, 5 Hun,

165; *Norton v. Wiswall*, 26 Barb. 618. Yet in *Singleton v. Railroad Co.*, 70 Ga. 464, where a lease had been authorized by statute, the lessor railroad was held liable to a passenger who was injured by the negligent operation of a train by the servants of the lessee railway, upon the ground that the statute authorizing the lease did not in terms exempt the lessor railway from liability; but this case seems to be in conflict with the current of authority. *Virginia Midland Ry. Co. v. Washington* (Va. 1890), 7 Ry. & Corp. L. J. 353, citing *Patterson on Railway Accidents*, §§ 130, 131.

<sup>83</sup> *Mahoney v. Railroad Co.*, 63 Me. 68; *Virginia Midland Ry. Co. v. Washington* (Vt. 1890), 7 Ry. & Corp. L. J. 353; *Nugent v. Railroad Co.*, 89 62-72.

<sup>84</sup> *Pittsburg, etc. R. Co. v. Kain*, 35 Ind. 291; *Beach on Railways*, § 569.

on railroad companies, are usually construed to apply to companies and persons who are in possession under contracts with, or by permission of, the company owning the railroad.<sup>85</sup>

**§ 1049. New York statutes as to lease of railways.**—In New York the statutes have long authorized leases of one railroad to another, and the acquiring of stock in a leased road.<sup>86</sup> Under the law providing, that,—“it shall be lawful hereafter for any railroad corporation to contract with any other railroad corporation for the use of their respective roads, and thereafter to use the same in such manner as may be prescribed in such contract; but nothing in this act contained shall authorize the road of any railroad corporation to be used by another railroad corporation in a manner inconsistent with the provisions of the charter of the corporation whose railroad is to be used under such contract,”—a railroad corporation has the right and power to lease its property and franchise to another railroad corporation, provided the same is to be used by the lessee for the purpose defined in the charter of the lessor, and may exercise this right and power in all cases where there is no prohibition against their exercise, contained in the charter of either company.<sup>87</sup> This act has been held by the Court of Appeals to confer power upon railroad corporations not only to acquire, but also to transfer to other railroad corporations by lease, the exclusive right to enjoy the property and privileges of the lessor.<sup>88</sup> And there is no statutory inhibition against such lease, although the roads are parallel and competing lines. The law prohibiting the merger or consolidation of companies whose railroads run on parallel or competing lines, does not apply to prevent the leasing of one railroad by another, even for a long period, as such leasing is not a merger or consolidation.<sup>89</sup> The legislature having authorized the leasing of parallel or competing railroads, the validity of the lease can not be questioned by the

<sup>85</sup> *Virginia Midland Ry. Co. v. Washington* (Va. 1890), 7 Ry. & Corp. L. J. 353, citing *Pierce on Railroads*, 283, 284; *Daconing v. Chicago, etc. R. Co.* (1876), 43 Iowa, 96; *Clary v. Iowa, etc. R. Co.*, 37 Iowa, 342; *Stewart v. Chicago, etc. R. Co.*, 27 Iowa, 282.

<sup>86</sup> These statutes are consolidated in the “Railway Law of 1890,” Laws of 1890, ch. 565, §§ 78, 79.

<sup>87</sup> *Gere v. New York, etc. R. Co.*

(1885), 19 Abb. N. C. 193, construing New York Laws 1839, ch. 218.

<sup>88</sup> *Woodruff v. Erie R. Co.*, 93 N. Y. 609; *Fisher v. New York, etc. Co.*, 46 N. Y. 644; *People v. Albany, etc. R. Co.*, 77 N. Y. 232; *Troy, etc. R. Co. v. Boston, etc. R. Co.*, 86 N. Y. 107; *Central, etc. R. Co. v. Twenty-third Street R. Co.*, 54 How. Pr. 168, 183.

<sup>89</sup> *Gere v. New York, etc. R. Co.* (1885), 19 Abb. N. C. 193; New York Laws 1869, ch. 917, § 9.

courts upon grounds of public policy.<sup>90</sup> Under these laws, however, there is no power to lease to individuals.<sup>91</sup> Thus a contract of a street railway company, after it had abandoned a portion of its road, giving a private individual the right to run freight cars over the unused portion of its road, was held void as against public policy.<sup>92</sup> A lease of a part of a road which it was understood should be abandoned by both parties, was, of course, unauthorized by the law that provided that all the duties of the lessor should be undertaken by the lessee.<sup>93</sup> A lease for four hundred and seventy-five years of the railroad of a company chartered for a hundred years only, is not void when there is a statute prescribing a method whereby the corporate existence may be perpetuated if desired by the stockholders.<sup>94</sup> A contract by the lessee company to pay as rent the interest on certain mortgage bonds of the lessor company during the continuance of the lease, and the principal at the termination of the same, is not *ultra vires*.<sup>95</sup> The New York laws grant to telegraph companies the most comprehensive powers in reference to the conduct of their business. The right of one company to lease the lines of another exists under the act, and a New York court will not interfere with such a transaction by injunction on the ground of its illegality in another State where part of the property of one of the companies is situated. Under the act of 1870, however, such a lease must be ratified by a three-fifths vote of its stockholders at a general meeting duly called for the purpose.<sup>96</sup>

**§ 1050. What a railroad lease carries.**—The lessee of a railroad is entitled to all the privileges of the lessor,<sup>97</sup> to the free use of the railway comprised therein, and to the enjoyment of

<sup>90</sup> Gere v. New York, etc. R. Co. (1885), 19 Abb. N. C. 193.

<sup>93</sup> Troy, etc. R. Co. v. Boston, etc. R. Co., 86 N. Y. 107.

<sup>91</sup> Abbott v. Johnstown, etc. R. Co., 80 N. Y. 28, where a horse railroad was leased to an individual, and for an injury resulting from negligence in handling a car, the company was sued; and it was held that there was no power to lease the road to an individual, and that the lessee must be regarded as agent of the lessor, which was liable for the injury.

<sup>94</sup> Gere v. New York, etc. R. Co. (1885), 19 Abb. N. C. 202; N. Y. Laws of 1866, ch. 697, § 5.

<sup>92</sup> Fanning v. Osborne, 102 N. Y. 441.

<sup>95</sup> Gere v. New York, etc. R. Co. (1885), 19 Abb. N. C. 192.

<sup>96</sup> Reiff v. Western Union Telegraph Co., 49 N. Y. Super. Ct. Rep. 441; New York Laws 1870, ch. 568.

<sup>97</sup> Fischer v. New York, etc. R. Co., 46 N. Y. 644. And it may charge any rates the company owning the leased line might make.

the powers and privileges granted to the lessor.<sup>98</sup> A road leasing another, likewise becomes subject to all the statutory duties, obligations and restrictions imposed upon the lessor.<sup>99</sup> The lessee of a railroad takes all the interest of the lessor company in lands or easements subject to its control, together with the power to condemn additional lands necessary for its proper use.<sup>1</sup> When the lessor company is itself the lessee of a road connecting with its own, a lease of its own original road, together with the road so held under lease by it, with the appurtenances and incidents, will pass to the lessee the control of both roads.<sup>2</sup> So a lease of a line of railway entitles the company becoming lessee, to the benefit of an agreement entered into by the lessor for the use of a part of a third company's line.<sup>3</sup> Where a railroad company leased its road and properties for nine hundred and ninety-nine years to another corporation, which agreed to pay all judgment liens against the lessor, and to complete its road, and the two companies executed a deed of trust to secure bonds of the lessor, the proceeds of which are received by the lessee, and partly used for its own benefit, the lessee was held liable for debts which existed against the lessor before the lease, though they were not reduced to judgment.<sup>4</sup> The obligation imposed upon the company to pay one per cent. of its gross earnings, being a charter obligation, and the consideration for its franchise, a subsequent lessee of the road is bound to discharge the obligation by paying the percentage, though the lease is silent in regard to it, and though there is no statutory provision for such liability. Charter rights can not be acquired by acts *in pais* without the assumption at the same time, of the charter duties.<sup>5</sup> But a lease of a railroad for ninety-nine years, the assumption of its debts and purchase of its rolling

<sup>98</sup> Chicago v. Evans, 24 Ill. 52; London, etc. Ry. Co. v. South Eastern Ry. Co., 8 Ex. 584; 8 Vic. ch. 20, § 113.

<sup>99</sup> *E. g.* in the matter of rates. McGregor v Erie R. Co., 36 N. J. Eq. 89; Chicago v. Evans, 24 Ill. 52; London, etc. Ry. Co. v. South Eastern Ry. Co., 8 Ex. 584, 8 Vic. ch. 20, § 113.

<sup>1</sup> And therefore, if a portion thereof be taken and condemned for the use of another road, the condemnation money is payable to the lessee, to be used by it during the term of the lease. Matter

of New York Cent. R. Co., 49 N. Y. 414.

<sup>2</sup> Philadelphia, etc. R. Co. v. Catawissa R. Co., 53 Pa. St. 20.

<sup>3</sup> London, etc. Ry. Co. v. South Eastern Ry. Co., 8 Ex. 584.

<sup>4</sup> Chicago, etc. Ry. Co. v. Third Nat. Bank (1890), 134 U. S. 276. This liability is not affected by the subsequent expenditure by the lessee, on the lessor's road, of an amount greater than the amount so misappropriated.

<sup>5</sup> City of New York v. Twenty-Third St. Ry. Co. (N. Y. 1889), 113 N. Y. 311.

stock, is not such an assignment as will place the transaction in the light of a trust, with preferences for the benefit of creditors.<sup>6</sup> Where a proposed "joint lease" between four railroad companies is executed by three, and the fourth company refuses to execute it, whereupon two of the others retract, equity will not compel the fourth company, at the suit of its stockholders, to execute the lease.<sup>7</sup> While the lessee may not, perhaps, be liable for the amount agreed upon in a contract of leasing, void because unauthorized, it may be required to pay a just compensation for the use of the property.<sup>8</sup> And the lessee and its assigns are estopped from pleading the want of statutory authority in an action to recover rent for the use of the road.<sup>9</sup> But the fact that the lessee company has retained possession of and continued to operate the road under a voidable lease, does not amount to a ratification, nor prevent it from making the defense of invalidity, in a suit by a stockholder of the lessor company to compel payment of the rent.<sup>10</sup>

**§ 1051. The law governing leased railroads.**—A foreign railway leasing a domestic one is subject to the laws of the residence of the lessor,<sup>11</sup> so far as they affect the property leased.<sup>12</sup> A receiver of a railroad, appointed by the governor, can not, by leasing the road, vest the lessees with such an interest in the road and its franchises that it can not be divested by an act of the legislature.<sup>13</sup> When a railroad company leases the road of another, its charges for transportation thereon, are subject only to the restrictions imposed upon the lessor and not to those imposed upon itself with respect to transportation upon its own line.<sup>14</sup> Lessees must conform to the charter requirements of the company whose road they occupy or use.<sup>15</sup> So also when the power to take a lease of

<sup>6</sup> Gratz v. Pennsylvania R. Co., 41 Pa. St. 447.

<sup>7</sup> Ives v. Smith (1890), 55 Hun, 606.

<sup>8</sup> Farmers' Loan & Trust Co. v. St. Joseph, etc. R. Co., 2 Fed. Rep. 117. But see Union Bridge Co. v. Troy, etc. R. Co., 7 Lans. 240, where it was held that in setting aside an *ultra vires* lease, the court will not relieve the parties more than is necessary for the public good, and that hence rent is not recoverable.

<sup>9</sup> Woodruff v. Erie Ry. Co., 93 N. Y. 609.

<sup>10</sup> Barr v. New York, etc. R. Co. (1889), 52 Hun, 555.

<sup>11</sup> McGregor v. Erie R. Co., 30 N. J. Eq. 115.

<sup>12</sup> Stone v. Illinois Central R. Co., 116 U. S. 347.

<sup>13</sup> McMinnville, etc. R. Co. v. Huggins, 59 Tenn. 177.

<sup>14</sup> Rodgers v. Wheeler, 43 N. Y. 598; Pearson v. Wheeler, 55 N. H. 41; Taylor on Corporations, § 417. *Cf.* Stratton v. European, etc. Ry., 74 Me. 422; Beeson v. Lang, 85 Pa. St. 197.

<sup>15</sup> City of Chicago v. Evans, 24 Ill. 52.

a railroad, built under the general railroad law, is derived solely from this law, the rights and liabilities under the lease are governed by it, and not by the charter of the company which becomes lessee.<sup>16</sup>

**§ 1052. Power to mortgage.**—A railroad corporation has no implied power to mortgage its railroad. Unless the power is expressly conferred, such a mortgage has no validity.<sup>17</sup> But, generally, railroad corporations are authorized by charter or State statute to mortgage their roads, property and franchises. Power to sell, implies the power to mortgage,<sup>18</sup> and power to pledge the franchises and rights of the corporation implies the power to pledge everything belonging to the corporation which may be necessary to the enjoyment of the franchise.<sup>19</sup>

*After-acquired property.*—A mortgage by a railroad company, describing the property as—"also all rights, power, privileges, and franchises relating to, or useful for, said railroad, or branch including the right to operate and maintain the same, whether now held or acquired by the mortgagor,"—was held to cover a line of railway subsequently purchased by the mortgagor as a branch for its main line.<sup>20</sup>

**§ 1053. Power of railroad company to acquire stock in other corporations.**—“Whether the purchase of stock in one corporation by another, is *ultra vires* or not, must depend upon the purpose for which the purchase was made, and whether such purchase was, under all the circumstances, a necessary or reasonable means of carrying out the objects for which the corporation was created, or one which under the statute it might accomplish.<sup>21</sup> As, where a railroad is authorized to acquire the property and franchises of another, it may do so by purchase of its stock;<sup>22</sup> and where the objects for which a corporation was created, requires it to invest funds, it may, in the absence of restriction, invest them in the stock of another corporation;<sup>23</sup> but, even when it is authorized to

<sup>16</sup> *McMillan v. Michigan, etc. R. Co.*, 16 Mich. 79.

<sup>17</sup> *Daniels v. Hart*, 118 Mass. 543; *Platt v. Union Pacific R. R.* (1878), 99 U. S. 48.

<sup>18</sup> *Willamette, etc. Co. v. Bank, etc.* (1886), 119 U. S. 191.

<sup>19</sup> *Mobile, etc. R. R. v. Talman* (1849), 15 Ala. 472.

<sup>20</sup> *Central T. Co. v. Washington Cent. R. Co.* (1903), 124 Fed. 813.

<sup>21</sup> *Hill v. Nesbit*, 100 Ind. 341; *Dewey v. Toledo, etc. Ry. Co.*, 91 Mich. 351; *Atchison, etc. R. Co. v. Cochran*, 43 Kan. 225, 19 Am. St. Rep. 129.

<sup>22</sup> *Todd v. Kentucky, etc. Co.*, 57 Fed. 47; *Hodges v. New England, etc. Co.*, 1 R. I. 347, 53 Am. Dec. 624.

<sup>23</sup> *In re Asiatic Banking Corp.*, 4 Cha. App. 252.

hold shares in other corporations, by investment, or in payment of debt, or as security for a loan, it may not, as a business, deal in the shares of other corporations.<sup>24</sup> The rule, that one corporation may not acquire the shares of another, applies where the purpose is to control the business of the other, in a way to remove competition. Such a purchase is *ultra vires* and contrary to public policy.<sup>25</sup>

**§ 1054. Traffic arrangements and contracts between connecting railroads.**—A railway company may make contracts for the transportation of freight and passengers beyond the termini of its own line.<sup>26</sup> And it has even been held that where such a contract contemplated the provision by the railway company of a steam vessel to carry its passengers and freight to points beyond its terminus, the contract was valid.<sup>27</sup> The company may arrange with other railway and steamboat companies the proportions, according to mileage or otherwise, for the division of the proceeds of that transportation between them.<sup>28</sup> The rule, governing a business or traffic contract or arrangement entered into by a railroad or other corporation charged with duties to the public, is that it must be incidental and auxiliary to the corporate purposes, and must not be injurious to the public, by rendering the corporation incapable of performing those public duties, or by creating a monopoly in the parties to the contract, or by stifling competition or otherwise, or by giving some persons unfair advantage over the general public. Subject to such rule, railroad corporations may contract with passengers and shippers, for carriage beyond their own lines,<sup>29</sup> with connecting transportation companies,<sup>30</sup> and divide fares and freights between the connecting companies.<sup>31</sup> Railroad companies whose roads form a continuous

<sup>24</sup> Holmes, etc. Manuf. Co. v. Holmes, etc. Metal Co., 127 N. Y. 252, 24 Am. St. Rep. 448.

<sup>25</sup> This subject has already been fully treated *supra*, §§ 855, 937, and 938.

<sup>26</sup> Railroad Co. v. Pratt (1874), 22 Wall. 123; Norfolk, etc. R. Co. v. Shippers, etc. Co. (W. Va. 1887), 30 Am. & Eng. R. Cas. 57; Kyle v. Laurens R. Co. (1857), 10 Rich. 382; St. Louis, etc. R. Co. v. Larner (1882), 103 Ill. 293; Wheeler v. San Francisco, etc. R. Co., 31 Cal. 46.

<sup>27</sup> South Wales R. Co. v. Redmond (1861), 10 C. B. N. S. 675.

<sup>28</sup> Columbus, etc. R. Co. v. Indianapolis, etc. R. Co. (1853), 5 McLean, 450; Elkins v. Camden, etc. R. Co. (1882), 36 N. J. Eq. 241.

<sup>29</sup> Railroad Co. v. Pratt, 22 Wall. 123. Chicago & Alton R. Co. v. Mulford, 162 Ill. 522.

<sup>30</sup> Wiggins Ferry Co. v. Chicago & Alton R. Co., 73 Mo. 389.

<sup>31</sup> Sussex R. Co. v. Morris, etc., 19 N. J. Eq. 13.

line, may severally appoint the same person as manager, and run through trains.<sup>32</sup> Arrangements between railroad corporations to divide through fares and freights or to offer inducements by a reduction in rates to secure freights and travel over their lines, are contracts concerning their own authorized business, and not objectionable unless unconscionable.<sup>33</sup> While the power to fix charges for transportation of passengers and freight is a franchise which should be exercised by each company separately, yet, if they agree that both together shall regulate their rates, it is no abandonment or transfer of the franchise of either.<sup>34</sup> The English Railway Clauses Act of 1845 gives special permission to one company to contract with other companies for the right of passage over their track.<sup>35</sup> Under this statute a company may enter into an agreement, that another company shall use its line, paying tolls fixed with reference to the gross receipts, and providing for the carriage of local traffic on certain terms, provided there be no stipulation preventing the first company from exercising its statutory powers, or from entering into similar agreements with other companies or persons.<sup>36</sup> But the act does not authorize a railroad to confer upon another carrier, running privileges over its road so

<sup>32</sup> State v. Concord R. Co., 59 N. H. 85.

<sup>33</sup> Morris, etc. R. Co. v. Sussex R. Co. (1869), 20 N. J. 542.

<sup>34</sup> Columbus, etc. R. Co. v. Indianapolis, etc. R. Co. (1853), 5 McLean, 450. Where the action of the boards of directors of two corporations is alleged to be *ultra vires*, stockholders may bring suit to restrain the two corporations from consolidating. Botts v. Simpsonville & B. C. Turnpike Co. (Ky. 1889), 10 S. W. Rep. 134.

<sup>35</sup> And enacts that "for the purpose aforesaid, it shall be lawful for the respective parties to enter into any contract for the division or apportionment of the tolls to be taken upon their respective railways, with the proviso, however, that no such contract shall in any manner affect, increase, or diminish, any of the tolls which the respective companies, parties to the contracts, shall for the time being be re-

spectively authorized and entitled to demand or receive from any person or any other company, but that all other persons and companies shall, notwithstanding any such contract, be entitled to the use and benefit of any of the said railways, upon the same terms and conditions, and on payment of the same tolls as they would have been in case no such contract had been entered into." 8 Vic. ch. 20, § 88. And this has been construed to give the right to contract for the privileges ordinarily attaching to such passage, of stopping at stations and taking up and putting down passengers and freight. Simpson v. Denison, 10 Hare, 51.

<sup>36</sup> Midland Ry. Co. v. Great Western Ry. Co., 8 Ch. 841; Great Northern Ry. Co. v. Manchester, etc. Ry. Co., 5 L. T. N. S. 667; Browne & Theobald's Ry. Law, 287.

extensive as practically to amount to a surrender of its franchises.<sup>37</sup> When a railroad company does more than make an ordinary contract with a connecting line for the transportation of passengers and merchandise and a division of receipts, and agrees to give the other company control or extensive running powers over its road, the contract is of questionable validity in view of the rule forbidding railroad companies to transfer their franchises or put it out of their power to serve the public as it was intended they should serve it, namely, through their own corporate management, and not by handing their property and franchises over to another corporation.<sup>38</sup> It is thus of a contract by which a railroad company gives up all practical control over its own road, and in effect leases it to another company.<sup>39</sup>

<sup>37</sup> Attorney-General v. Great Eastern Ry. Co., 11 Ch. Div. 449; Gardner v. London, etc. Ry. Co., L. R. 2 Ch. 212; Johnson v. Shrewsbury, etc. Ry. Co., 3 De Gex, M. & G. 914.

<sup>38</sup> Taylor on Corp., § 308; State v. Hartford, etc. R. Co., 29 Conn. 538; Johnson v. Shrewsbury, etc. Ry. Co., 3 De G., M. & G. 914; Garner v. London, etc. Ry. Co., L. R. 2 Ch. 212.

<sup>39</sup> Ohio Ry. Co. v. Indianapolis, etc. R. Co., 5 Am. L. Reg. N. S. 733; Simpson v. Denison, 10 Hare, 51; Midland Ry. Co. v. Great W. Ry. Co., L. R. 8 Ch. 841; Atty.-Gen. v. Great E. Ry. Co., 11 Ch. Div. 449; Naugatuck R. Co. v. Waterbury, etc. Co., 24 Conn. 468, 482. In the principal case it was asked: "What then is the legal effect of the contract between the parties? It is to secure to the defendants the use of plaintiffs' roadway for thirty years, on certain conditions, which are the equivalent for what otherwise would be denominated an annual rental: First. The defendants are permitted to lay down, at their own expense, upon the plaintiffs' structure, and additional rail, to remain there subject to all appropriate repairs by the defendants, to be used by them for the entire term. Second, The cars of

the defendants are to be run over the road, and it is admitted have been drawn by the defendants' locomotives, under charge of their conductors, and with certain deductions, at their expense, the right to do so being co-extensive with the term already stated. If the plaintiffs merely engaged to be carriers of all the freight and passengers brought by the defendants to Lawrenceburg, from thence to Cincinnati, and received therefor a fair equivalent, there would be no difficulty in giving such a construction to the agreement as would create a personal obligation only between the parties; but in order to give it this effect, and secure to the defendants its full benefit, they must not only enjoy, but be protected in the enjoyment of what is in reality the easement growing out of, and dependent upon, the occupation of the plaintiffs' railway for the entire period of the contract, uncontrolled by the plaintiffs so long as the conditions the defendants were bound to perform are properly fulfilled. If the plaintiffs are not bound to permit the defendants to use their road, the defendants can not be required to perform their part of the agreement; and if they do, the right to occupy is connected directly with

**§ 1055. Effect of traffic arrangements.**—Railway connections, even when required by charter, are but temporary arrangements, and the company accommodated may obtain an extension so as to do its own business, without continuing the connection.<sup>40</sup> This is so even where in consequence of the building of a road by an independent company from a point on another road in a diverging direction, the main road was induced to make expensive and permanent arrangements for the accommodation of the traffic brought to its line by the second road which acted virtually as a branch.<sup>41</sup> And in such case the connecting company may build a line from a point near such intersection parallel with the main road to the same terminal city, and discontinue the use of the facilities of the main line.<sup>42</sup> The original contract for connection and traffic accommodation is not to be considered a permanent and perpetual one.<sup>43</sup> And a legislative permission to connect the lines of railway companies imposes no obligation upon either company to do so, and it is optional to continue it.<sup>44</sup> But if the connection be under and by force of a contract, its continuance in certain cases may be enforced in equity.<sup>45</sup> In the case, however, of traffic arrangements, which are legally authorized, where mutual facilities are given, or where one company gives consideration to the other, a working agreement must be presumed to be irrevocable in the absence of evidence to the contrary.<sup>46</sup> Therefore, when

the realty, and is in effect a lease of the railway." *Winch v. Birkenhead, etc. R. Co.*, 5 De Gex & S. 562; *Clay v. Rufford*, 5 De Gex & S. 769; *Beman v. Rufford*, 1 Sim. N. S. 550.

<sup>40</sup> *Boston, etc. R. Co. v. Boston, etc. R. Co.* (1850), 5 *Cush.* 375.

<sup>41</sup> *Boston, etc. R. Co. v. Boston, etc. R. Co.* (1850), 5 *Cush.* 375.

<sup>42</sup> *Boston, etc. R. Co. v. Boston, etc. R. Co.* (1850), 5 *Cush.* 375.

<sup>43</sup> *Boston, etc. R. Co. v. Boston, etc. R. Co.* (1850), 5 *Cush.* 375.

<sup>44</sup> *Androscoggin, etc. R. Co. v. Androscoggin R. Co.*, 52 *Me.* 417. Appleton, C. J., said in this case: "The duty or obligation thus imposed upon the railroad with which the connection is made, does not restrict it in the general management and control of its road. The obligation to receive and transport is subordinate to the

general powers of the corporation to manage and control its property and determine its gauge. It authorized the connecting railroad to require the reception and transportation of all persons and property it transports to the railroad with which it connected. It imposed upon the latter only the obligation to receive and to transport. It did not require the former to bring persons or goods to be transported. It left the general rights of the corporation unaffected and unmodified, except as changed in this single respect."

<sup>45</sup> *Androscoggin, etc. R. Co. v. Androscoggin R. Co.* (1864), 52 *Me.* 434, citing *Columbus, etc. R. Co. v. Indianapolis, etc. R. Co.*, 5 *McLean*, 450; *Great Northern R. Co. v. Manchester, etc. R. Co.*, 5 *De G. & S.* 138.

<sup>46</sup> *Great Northern Ry. Co. v.*

two railroads agree to build a road between certain cities, to connect with each other at a given place, if one of the companies is about to change its gauge so as to break up the connection contemplated, an injunction will be granted, to prevent the change of gauge.<sup>47</sup> A provision that the receipts from through traffic shall be apportioned between the companies according to their mileage, with an allowance for working expenses, is valid.<sup>48</sup> But if the consideration amounts to a guaranty by the running company of the dividends upon the capital stock of the other, irrespective of the amount of traffic carried, the agreement is beyond the corporate powers.<sup>49</sup> The words, "any future extension or branches," in a contract between two connecting railroad corporations for a division or drawback of freights and fares over the roads, "or any future extensions or branches of the same," must not be construed, in their general sense, to apply to extensions then unauthorized by the legislature, where there were unexhausted powers in the charter and supplements, at the time of the contract, to build other extensions or branches, sufficient to meet the requirements of the words.<sup>50</sup>

**§ 1056. "Pooling" contracts, between railroads.**—Pooling traffic agreements between competing railroads for division of the surplus of all their earnings in the competing traffic, after payment of operating expenses, are illegal, contrary to public policy, and void, at common law, where made to suppress or limit competition.<sup>51</sup> Such traffic rates are illegal, as unlawful monopolies, against the act of Congress of July 2, 1890.<sup>52</sup> A court of equity

Manchester, etc. Ry. Co., 5 De G. & S. 138; Llanelly Ry. Co. v. London, etc. Ry. Co., L. R. 7 H. L. 550; Browne & Theobald's Ry. Law, 287.

<sup>47</sup> Columbus, etc. R. Co. v. Indianapolis, etc. R. Co. (1853), 5 McLean, 450.

<sup>48</sup> Llanelly, etc. Co. v. London, etc. Ry. Co., L. R. 7 H. L. 550.

<sup>49</sup> Simpson v. Dennison, 10 Hare, 51; 16 Jur. 830; Browne & Theobald's Ry. Law, 288. Thus an agreement under which one company is to carry the whole traffic of the other company in consideration of such "toll" as will, when added to the net profits of the second company, make up its dividend to a certain amount, is not

valid under this section. Simpson v. Dennison, 10 Hare, 51; 16 Jur. 830; Browne & Theobald's Ry. Law, 288.

<sup>50</sup> Morris, etc. R. Co. v. Sussex R. Co. (1869), 20 N. J. Eq. 542.

<sup>51</sup> Charlton v. New Castle, etc. Ry. Co. (1859), 5 Jur. N. S. 1096, 29 L. R. A. 423, 50 Am. St. Rep. 807; Bald Eagle, etc. R. R. Co. v. Nittany Valley R. R. (1895), 171 Pa. St. 284; Cleveland, etc. Ry. Co. v. Closser (1890), 126 Ind. 348, 9 L. R. A. 754, 22 Am. St. Rep. 593; Metropolitan, etc. Co. v. Coleman's, etc. R. R. (1899), 95 Fed. Rep. 18.

<sup>52</sup> United States v. Trans-Missouri, etc. Assn. (1897), 166 U. S. 290; United States v. Joint Assn. (1898), 171 U. S. 505.

may, by decree of specific performance, enforce a contract between railroad companies, where one is given the right to run its trains over the tracks of the other.<sup>53</sup> Contracts of railroads for interchange of traffic, and division of its earnings, are valid, and are upheld by the court, where the railroads are not in competition.<sup>54</sup> Agreements between railroads for the joint use of parts of each others depots and tracks, in running trains over them, are held to be not leases, and are favored and enforced by the courts.<sup>55</sup> Such an agreement is defined to be "an agreement for trackage rights, for running arrangements, a 'terminal contract,' with compensation on a 'mileage' or 'wheelage' basis, rather than a lease."<sup>56</sup> A traffic contract for running the cars of one company or those of its assigns, over the tracks of another company, will not authorize an assign to run over such tracks, cars from other lines.<sup>57</sup> Such a traffic contract does not create a partnership or make one railroad the agent of another, without express authority.<sup>58</sup>

**§ 1057. Pools and combinations between competing parallel railroads.**—"Not only is the purchase of stock in another company beyond the power of a railroad corporation, in the absence of an express stipulation in the charter, but the purchase of stock in a rival and competing line is held to be contrary to public policy and void."<sup>59</sup> Whether or not the power to amend it, was reserved in the charter, the legislature, in exercise of the police power of the State, may forbid any consolidation of a railroad with a competing line.<sup>60</sup> It is illegal, at common law, for one

<sup>53</sup> Cumberland Valley R. R. Co. v. Gettysburg, etc. Ry. Co. (1896), 177 Pa. St. 519; Union Pac. Ry. Co. v. Chicago, etc. Ry. Co., 51 Fed. Rep. 309 (1892), 163 U. S. 564 (1896); Joy v. St. Louis, 138 U. S. 1 (1891).

<sup>54</sup> Cumberland Valley R. R. v. Gettysburg, etc. Ry. (1896), 177 Pa. St. 519.

<sup>55</sup> Chicago, etc. Ry. v. Rio Grande, etc. R. R. (1892), 143 U. S. 596; Chicago, etc. Ry. v. Union Pac. Ry. (1891), 47 Fed. Rep. 151; Chicago, etc. Ry. v. Denver, etc. R. R. (1891), 45 Fed. Rep. 304; Chicago, etc. Ry. v. Ayres (1892), 140 Ill. 644.

<sup>56</sup> Union Pac. Ry. v. Chicago, etc. Ry. (1896), 163 U. S. 564.

<sup>57</sup> South, etc. Ry. v. Second

Ave., etc. Ry. (1899), 191 Pa. St. 492.

<sup>58</sup> St. Louis v. Neel (1892), 56 Ark. 279, 19 S. W. 963; Post v. Southern Ry. Co. (1899), 103 Tenn. 184, 55 L. R. A. 481.

<sup>59</sup> Louisville, etc. R. R. v. Kentucky (1896), 161 U. S. 677, 177 U. S. 230; Hamilton v. Clarion, etc. R. R. (1891), 144 Pa. St. 34, 13 L. R. A. 779.

<sup>60</sup> Pearsall v. Great Northern Ry. (1896), 161 U. S. 646; Clemens, etc. Co. v. Walton (1899), 173 Mass. 286; Wallace v. Ann Arbor, etc. Ry. (1899), 121 Mich. 588; City of Kalamazoo v. Kalamazoo, etc. Co. (1900), 124 Mich. 74; Detroit v. Common Council (1901), 125 Mich. 673, 84 Am. St. Rep. 589; Shadford v. Detroit, etc. R. R., 89 N. W. Rep. 960 (Mich. 1902).

competing railroad to contract with the bondholders of another to buy out their bonds, foreclose them, buy in the road at foreclosure and sale, reorganize it and transfer half the stock to the vendor company, and operate the two roads together in harmony.<sup>61</sup> Under the Anti-trust act of Congress of 1890, it is unlawful for a corporation to hold a majority of the stock of two competing interstate railway corporations.<sup>62</sup>

**§ 1058. Running steamboats and ferries to do connecting business.**—Without legislative authority railway companies may not run steamship lines.<sup>63</sup> So, it is held that a railway can not secure the capital and guarantee the profits of a steamboat company run in connection with its line.<sup>64</sup> And a corporation, chartered to construct and operate a railroad, and to organize and carry on a banking business, has no authority to enter into a partnership with a private individual to purchase and run a steamboat on a river forming no part of its route.<sup>65</sup> But under an express power to build and run steamboats, a railway company may employ the boats of others and guaranty that their gross earnings shall not fall below a certain amount.<sup>66</sup> And it has been held that a railway corporation, as well as a natural person, may become a joint owner of a ferry, if its charter and constitution do not preclude it, and, like a natural person, may compel an account for

<sup>61</sup> Pearsall v. Great Northern Ry. (1896), 161 U. S. 646.

<sup>62</sup> United States v. Northern Securities Co. (1903), 120 Fed. Rep. 721 (1903). *Vide supra*, § 939, NORTHERN SECURITIES CO.'S CASE, and §§ 945-947, RAILROAD TRAFFIC CONTRACTS, "POOLS," RATES AND REBATES.

<sup>63</sup> Pearce v. Madison, etc. R. Co., 21 How. 441; Hoagland v. St. Joseph R. Co., 39 Mo. 460.

<sup>64</sup> Colman v. Eastern Counties Ry. Co. (1846), 10 Beav. 1; Browne & Theobald's Railway Law, 96.

<sup>65</sup> But the corporation cannot defeat liability for an injury caused by the negligence of an officer on a steamboat with the plea that the running of the steamboat was *ultra vires*. Central R. & Banking Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353.

<sup>66</sup> As where a railroad corporation, whose road extended from

Lake Michigan to the Mississippi river, was authorized to make "such contracts as the management of its railroad and the convenience and interests of the corporation might require," and "to build and run as a part of its corporate property such number of steamboats as they may deem necessary," and "to accept from any other state and use any powers or privileges . . . applicable to the carrying of persons and property by railway or steamboat," it was held, to have the power to employ steamboats belonging to others, running from its eastern terminus along the Great Lakes eastward, to carry passengers and freight in connection with its own road, and to guaranty that the gross earnings of the boats should not be below a certain sum. Green Bay, etc. R. Co. v. Union Steamboat Co. (1882), 107 U. S. 98.

its share of the earnings without any question upon this point.<sup>67</sup> So a railway company, bound to supply boats for a ferry, may employ the boats, when not wanted for the ferry, in excursions to places not mentioned in its acts.<sup>68</sup> And it has been held as too plain to need authority that a railroad company, authorized to contract for the transportation and delivery of passengers and freight beyond its termini, may purchase a steamboat to run from the terminus to a point beyond.<sup>69</sup> A railroad company may lawfully own boats, for transportation of freight and passengers across navigable waters on its line, or across such waters at the end of its line, and separating it from the substantial terminus.<sup>70</sup>

**§ 1059. Ultra vires acts of railroads. Business not allowed.** In general, any corporate act which is contrary to declared public policy is void. Any stockholder of a railroad corporation may enjoin it from doing any act which may make it liable to forfeiture of its charter.<sup>71</sup> Among the acts which, if done by a railroad corporation, are *ultra vires*, are the following: The corporation may not subscribe for stock in another corporation.<sup>72</sup> It may not engage in the business of water transportation.<sup>73</sup> It may not extend its railroad beyond the limit fixed in its charter,<sup>74</sup> or improve the navigation of a river, or improve a harbor,<sup>75</sup> or materially change the line,<sup>76</sup> or agree with a competing road that it will not complete its own road.<sup>77</sup> It can not take a gift of land lying adjacent to its road.<sup>78</sup> It may not limit its carriage to passengers, if chartered to carry also freight.<sup>79</sup> It may not engage in the warehouse business, except as incidental to its railroad business.<sup>80</sup> It may construct and maintain a telegraph line along

<sup>67</sup> Hackett v. Multnomah Ry. Co. (1885), 12 Oreg. 124, 53 Am. Rep. 327.

<sup>68</sup> Forest v. Manchester, etc. Ry. Co., 30 Beav. 40; Browne & Theobald's Ry. Law, 96.

<sup>69</sup> Shawmut Bank v. Plattsburg, etc. R. Co. (1859), 31 Vt. 491.

<sup>70</sup> Wheeler v. San Francisco, etc. Ry. Co., 31 Cal. 46, 89 Am. Dec. 147.

<sup>71</sup> Bliss v. Anderson (1858), 31 Ala. 612, 70 Am. Dec. 511.

<sup>72</sup> Military, etc. v. Savannah, etc. Ry. (1898), 105 Ga. 420.

<sup>73</sup> Hartford, etc. R. R. v. Crosswell (1843), 5 Hill, 383, 50 Am. Dec. 354.

<sup>74</sup> Stevens v. Rutland, etc. R. R. (1851), 29 Vt. 545.

<sup>75</sup> Munt v. Shrewsbury, etc. Ry. (1850), 13 Beav. 1.

<sup>76</sup> Tippecanoe County v. Lafayette, etc. R. R. (1875), 50 Ind. 85.

<sup>77</sup> Hartford, etc. R. R. v. New York, etc. R. R. (1865), 3 Rob. (N. Y.) 411.

<sup>78</sup> Case v. Kelly (1890), 133 U. S. 21; Reed v. Johnson (1901), 27 Wash. 42, 67 Pac. 381, 57 L. R. A. 404.

<sup>79</sup> Chicago v. Oshkosh, etc. R. R. (1900), 107 Wis. 192.

<sup>80</sup> State v. Southern, etc. Co., 52 La. Ann. 1822 (1900), 28 So. 372.

its right-of-way.<sup>81</sup> It may lease and maintain a summer hotel at its seaside terminus.<sup>82</sup> The power to own or operate a canal, or any part thereof, is not incidental to a railway company;<sup>83</sup> nor has it power to improve the navigation of a stream, upon which it has extensive wharves whose business is failing by reason of the deterioration of the river as a water-way.<sup>84</sup> By the constitution of Pennsylvania, a company doing business as a common carrier can not engage in mining or manufacturing articles for transportation over its route, nor directly or indirectly engage in any other business; nor hold any land except such as is necessary to its business.<sup>85</sup> The same rule has been established by judicial decisions in England.<sup>86</sup> But after a company has already engaged in working collieries, an act authorizing it to dispose of them within five years, will legalize past workings, and entitle the company to continue the workings down to the sale.<sup>87</sup> It has been held also that neither a railroad corporation, nor one organized for the manufacture and sale of musical instruments, has the power to guaranty the payment of expenses of a musical festival, although the guaranty was made with the reasonable belief that the festival would be of great pecuniary benefit to the corporation, and expenses were incurred in reliance upon such guaranty;<sup>88</sup> and a subscription of a railway company to the Imperial Institute has been held *ultra vires*.<sup>89</sup> It is contrary to public policy for a railway company to give an express company exclusive privileges over its line, because such companies have been granted franchises for the public good which they must exercise impartially in favor of all.<sup>90</sup> A contract to convey land to a rail-

<sup>81</sup> Western Union Tel. Co. v. Rich (1878), 19 Kan. 517, 27 Am. Rep. 509.

<sup>82</sup> Jacksonville, etc. Nav. Co. v. Hooper (1896), 160 U. S. 514.

<sup>83</sup> Plymouth R. Co. v. Colwell (1861), 39 Pa. St. 337.

<sup>84</sup> Munt v. Shrewsbury, etc. Ry. Co. (1850), 13 Beav. 1.

<sup>85</sup> Pa. Const. (1874), art. xvii, § 5. But mining or manufacturing companies may carry their products over their own railways of fifty miles in length.

<sup>86</sup> Thus, a railway company has been held to have no implied authority to work coal mines, except for its own use, nor to deal in

coal for purposes of profit. Attorney-General v. Great Northern Ry. Co., 8 Week. Rep. 556, 1 Drew. & S. 154; Browne & Theobald's Ry. Law, 96.

<sup>87</sup> Ecclesiastical Commissioners v. North Eastern Ry. Co., 4 Ch. Div. 845; Browne & Theobald's Ry. Law, 96; Beach on Railways, § 513.

<sup>88</sup> Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221.

<sup>89</sup> Tomkinson v. South Eastern Ry. Co., 35 Ch. Div. 675; Browne & Theobald's Ry. Law, 97.

<sup>90</sup> Southern Express Co. v. Memphis, etc. R. Co., 2 McCrary, 570; Express Companies v. Railway

way company to secure the location of a station upon it, is contrary to public policy; for railway stations are presumably located with a view to the convenience of the public, and no other motive should be allowed to operate to influence their location.<sup>91</sup> This,

Companies, 3 McCrary, 147; Stanford v. Railroad Co. (1885), 24 Pa. St. 378; Dinsmore v. Louisville, etc. R. Co., 2 Flippin, 672; New England Express Co. v. Maine Central R. Co. (1869), 57 Me. 188, 2 Am. Rep. 31. In the Pennsylvania case above cited the chief justice said: "The power to regulate the transportation on the road does not carry with it the right to exclude any particular individuals, or to grant exclusive privileges to others. Competition is the best protection to the public, and it is against the policy of the law to destroy it by creating a monopoly of any branch of business. It cannot be done except by the clearly expressed will of the legislative power. Limited means may perhaps limit the amount of business done by a railroad company, but it can never furnish an excuse for appropriating all its energies to any particular individuals. If it possessed this power it might build up one set of men and destroy others; advance one kind of business, and break down another; and might make even religion and politics the tests in the distribution of its favors. Such a power in a railroad corporation might produce evils of the most alarming character. The rights of the people are not subject to such corporate control. Like the customers of a grist mill they have a right to be served, all other things being equal, in the order of their applications. A regulation, to be valid, must operate on all alike. If it deprives any persons of the benefits of the road or grants exclusive privileges to others, it is against law and void." In the later Maine case Chief Justice Appleton states

the law thus: "The very definition of a common carrier excludes the right to grant monopolies or to give special and unequal preferences. It implies indifference as to whom they serve, and an equal readiness to serve all who may apply, and in the order of their application. The defendants derive their chartered rights from the state. They owe an equal duty to each citizen. They are allowed to impose a toll, but it is not to be so imposed as specially to benefit one and injure another. They cannot, having the means of transporting all, select from those who may apply, some whom they will, and reject others whom they can, but will not carry. They cannot rightfully confer a monopoly upon individuals or corporations. They were created for no such purpose. They may regulate transportation, but the right to regulate gives no authority to refuse, without cause, to transport certain individuals and their baggage or goods, and to grant exclusive privileges of transportation to others. The state gave them a charter for no such purpose."

<sup>91</sup> Beach on Railways, § 526; Fuller v. Dame (1836), 18 Pick. 472; Pacific R. Co. v. Seely, 45 Mo. 212 (1870); 100 Am. Dec. 369; Bestor v. Wathen, 60 Ill. 138; St. Louis, etc. R. Co. v. Mathers, 71 Ill. 592, 22 Am. Rep. 122; Marsh v. Fairbury, etc. R. Co., 64 Ill. 414, 16 Am. Rep. 564; Linder v. Carpenter, 62 Ill. 309; St. Joseph, etc. R. Co. v. Ryan, 11 Kan. 602, 15 Am. Rep. 357; Halladay v. Patterson, 5 Oreg. 177, where the company abandoned a shorter location of its road so as to pass and locate its depot at a particu-

however, is a mooted point, and there are authorities to the contrary.<sup>92</sup> The contract of a railroad, with a shipper, exempting itself from liability for its own negligence, is void.<sup>93</sup> In case of a sale by an insolvent railroad to another railroad company for its bonds, guaranteeing its property free from incumbrance,—*Held* that the guaranty was personal to the purchasing corporation and not enforceable in equity for benefit of the vendor company's bondholder.<sup>94</sup>

**§ 1060. Powers of railroad president.**—The powers of the president of a railroad company are generally of more limited scope than those of banks or manufacturing companies.<sup>95</sup> He has no authority, by mere virtue of his office, to let a contract for the construction of the railway.<sup>96</sup> A statement by the president of a corporation, upon a certain price being named, that if that was the lowest figure he would see that the company paid it, is not an agreement by the company to pay that sum.<sup>97</sup> He can not sell its bonds,<sup>98</sup> nor authorize a director to sell them.<sup>99</sup> Neither

far place in consideration of the promise of defendant and others to pay certain sums therefor. See *Williamson v. Chicago, etc. R. Co.*, 53 Iowa, 126. Compare *Workman v. Campbell*, 46 Mo. 305.

<sup>92</sup> *Cedar Rapids, etc. Ry. Co. v. Spafford*, 41 Iowa, 292; *First Nat. Bank v. Hendric*, 49 Iowa, 402, 31 Am. Rep. 153. See *Berryman v. Cincinnati R. Co.* (1879), 14 Bush, 755, in which case a subscription of money to procure the location of a railway line through a certain city, was held binding.

<sup>93</sup> *Liverpool, etc. Co. v. Phenix Ins. Co.* (1889), 129 U. S. 397; *Thomas v. Wabash, etc. Ry.*, 63 Fed. Rep. 200 (1894).

<sup>94</sup> *Randall v. Detroit, etc. Ry.* (Mich. 1903), 96 N. W. 567.

<sup>95</sup> *Vide supra*, §§ 793–797, POWERS OF PRESIDENT; Beach on Railways, §§ 482, 483.

<sup>96</sup> *Griffith v. Chicago, etc. R. Co.* (1888), 74 Iowa, 85; *Templin v. Chicago, etc. R. Co.* (1888), 73 Iowa, 548. So where plaintiff is employed by the president of a railroad company owning a fran-

chise, but whose road is not yet built, to procure some person to build the road on terms profitable to the president, and finally an agreement is made by which the franchises of the road are to be turned over to one L., who is to advance the money and build the road, taking one-half the profits for himself, the balance to be divided between the plaintiff and the president of the road, plaintiff cannot recover from the railroad company for his services in obtaining the contract. It makes no difference whether the directors of the company knew and approved the contract or not. The company was not bound by it, and could repudiate it as a diversion of profits, which it was the duty of its agents to abstain from appropriating to themselves. *Van Valkenburgh v. Thomasville, etc. R. Co.* (1889), 4 N. Y. Supp. 782.

<sup>97</sup> *Van Valkenburgh v. Thomasville, etc. R. Co.* (1889), 4 N. Y. Supp. 782.

<sup>98</sup> *Second Avenue R. Co. v. Mehrbach* (1883), 49 N. Y. Super.

<sup>99</sup> *Titus v. Cairo, etc. R. Co.*, 37 N. J. 98.

can he appoint an agent to sell its lands.<sup>1</sup> But it is held that he has the right to indorse and assign notes and mortgages given to it to aid in the construction of the railway, and that the indorsee before maturity takes the notes free from any equities between the maker and the company.<sup>2</sup> A contract executed and sealed in the name of the corporation by its president and secretary, though without the express consent of the directors, is binding on the corporation when it has received benefits under the contract, and conducted its business in compliance therewith in such a manner that the directors must have known of it.<sup>3</sup>

**§ 1061. Certain powers of railroad directors.**—The directors of railway companies have power to regulate rates and to enter into contracts to carry upon certain terms for a specified time.<sup>4</sup> And such an agreement may be enforced against the company, although the time designated extend beyond the term of office of the directors making it.<sup>5</sup> It is within the powers of directors of railways to enter into traffic agreements with connecting lines,<sup>6</sup> and when the pooling of earnings with other companies is recognized as valid under existing laws, the directors have authority to make contracts of that character.<sup>7</sup> So also the directors have been held not to have exceeded their powers in sharing with another company the expenses of a depot constructed by the latter for the accommodation of their joint traffic.<sup>8</sup> But the board of

Ct. 267. In this case a resolution of a corporation authorized its president to sell certain bonds at a certain price. The president lent the bonds, and it was held, in an action against him for their conversion, that the question of his general powers as president had no bearing upon the case; that, as to these bonds, the extent of his authority was measured by the resolution.

<sup>1</sup> Chicago, etc. R. Co. v. James, 22 Wis. 194. Nor can he himself purchase or sell lands in behalf of the company. Bliss v. Kaweah Canal, etc. Co., 65 Cal. 502; Beach on Railways, §§ 482, 483.

<sup>2</sup> Irwin v. Bailey, 8 Biss. C. Ct. 523. And where the note and mortgage were first attached to a bond of the company and transferred as collateral to it, a subsequent indorsement by the president is valid to pass the legal

title to the equitable owner. A subsequent indorsee may sue in his own name, though he has no actual interest in the note, if it was indorsed to him for that purpose. Irwin v. Bailey, 8 Biss. C. Ct. 537.

<sup>3</sup> Jourdan v. Long Island R. Co. (1889), 115 N. Y. 380.

<sup>4</sup> *Vide supra*, §§ 725-773, DIRECTORS AND OFFICERS; Beach on Railways, § 469; Railroad Co. v. Furnace Co. (1881), 37 Ohio St. 321, 41 Am. Rep. 509; Beveridge v. Elevated Railway Company, 112 N. Y. 1.

<sup>5</sup> Railroad Co. v. Furnace Co. (1881), 37 Ohio St. 321, the time being for ten years.

<sup>6</sup> Elkins v. Camden & A. R. Co. (1882), 36 N. J. Eq. 241.

<sup>7</sup> Elkins v. Camden, etc. R. Co., 36 N. J. Eq. 241.

<sup>8</sup> Nashua, etc. R. Co. v. Boston, etc. R. Co., 27 Fed. Rep. 821.

directors of a railroad company have no authority, without the sanction of a lawful meeting of the stockholders, to make a lease for years of the road and property of the company, with authority to the lessees to operate the road and to charge for carrying upon it.<sup>9</sup> This is so especially of a lease for a term of years long enough to make the lease practically a sale.<sup>10</sup> And, even a majority of the board of directors of a passenger railway company, though controlling a majority of the stock, have no power, without special authority in their charter, to execute a lease of the road and property without first submitting the question to the stockholders at a meeting called in accordance with their charter.<sup>11</sup>

**§ 1062. Operation of railway. Liability for failure to operate. Mandamus.**—In case a railway corporation ceases to operate its line or any part of it, or fail in the performance of any other of its duties to the public, it may be punished by indictment or by forfeiture of its charter, or it may be compelled to perform its duty by writ of *mandamus*. That is the proper remedy to compel the corporation to operate its railroad.<sup>12</sup> A private individual may enforce this obligation by *mandamus*,<sup>13</sup> or a lessor of the railroad may enjoin its lessee or his assignee of the lease from ceasing to operate the railroad, where the discontinuance would subject the lessor's charter to forfeiture.<sup>14</sup> But the receiver of a railroad under foreclosure may be authorized by the court to discontinue the operation of such part of the railroad line as is operated at a loss, and to take up and sell the tracks.<sup>15</sup> *Mandamus* will not lie to compel the stoppage of trains at a station, when they stop at the company's near-by station. This was in case of removal of the county-seat and most of the residents from the old station to the new.<sup>16</sup> In the absence of statute imposing the duty, *mandamus* will not lie to compel a corporation to do a particular act.<sup>17</sup> It will lie at the suit of a traveler to compel a street railway to give transfers in compliance with its contract with the city.<sup>18</sup> It

<sup>9</sup> Stevens v. Davison (1868), 18 Gratt. 819, 98 Am. Dec. 692.

<sup>10</sup> Metropolitan Elevated Ry. Co. v. Manhattan Elevated Ry. Co., 11 Daly, 373, 14 Abb. N. Cas. 103.

<sup>11</sup> Martin v. Continental Pass. Ry. Co., 14 Phila. (Pa.) 10.

<sup>12</sup> State v. Paterson, etc. R. R., 43 N. J. L. 505, 21 N. J. L. 9.

<sup>13</sup> Union Pac. R. R. v. Hall, 91 U. S. 343; Chicago, etc. Ry. v. Crane (1885), 113 U. S. 424; Peo-

ple v. Colorado, etc. R. R. (1890), 42 Fed. Rep. 638.

<sup>14</sup> Southern Ry. v. Franklin, etc. R. R. (1899), 96 Va. 693, 44 L. R. A. 297.

<sup>15</sup> Royal Trust Co. v. Washburn, etc. Ry. (1901), 113 Fed. Rep. 531.

<sup>16</sup> Northern Pac. R. R. v. Dustin (1892), 142 U. S. 492.

<sup>17</sup> People v. Brooklyn, etc. R. R. (1902), 172 N. Y. 90.

<sup>18</sup> Richmond, etc. Co. v. Brown (1899), 97 Va. 26, 32 S. E. 775.

will lie to compel a railroad to operate passenger trains separately from freight trains.<sup>19</sup> *Mandamus* will not lie, except at suit of the State to compel a railroad corporation to establish a station at a particular point.<sup>20</sup>

**§ 1063. Injunction against interference by strikers.**—Strikers interfering with railroad traffic may be enjoined by a court, and may be punished for contempt of court for violation of such injunction.<sup>21</sup> It is contempt of court for strikers to prevent employes of the receiver of a railroad from working.<sup>22</sup> Any combination of railroad employes to refuse to handle interstate freight is criminal conspiracy, under statutes of the United States. Though they are free to quit work, such employes must not discriminate against interstate freight.<sup>23</sup> Injunction will lie at instance of the employer, to restrain his employes from intimidating other persons from accepting employment under him.<sup>24</sup>

**§ 1064. Railroad not liable to sale under levy of execution.**—

The necessity to the public that the regular service of railroads shall not be interfered with, will not allow it or any of its property necessary to such service to be taken in any part in levy of execution, in the absence of express authority of statute. The levy must be upon the whole of the property or none. The judgment creditor's remedy is in equity for appointment of a receiver.<sup>25</sup> Land acquired by a railroad for its uses in performing its duties to the public, can not be sold on execution apart from its franchises, so as to give title to the property free from the duties assumed by the corporation.<sup>26</sup>

<sup>19</sup> People, etc. v. St. Louis, etc. R. R. (1898), 176 Ill. 512.

<sup>20</sup> Florida, etc. Co. v. State, 31 Fla. 482 (1893), 13 So. 103, 20 L. R. A. 419, 34 Am. St. Rep. 30.

<sup>21</sup> *In re Lennon* (1893), 150 U. S. 393; Lake Erie, etc. Ry. v. Bailey (1893), 61 Fed. Rep. 494; Second v. Toledo, etc. Ry., 7 Biss. 513; *In re Higgins* (1886), 27 Fed. Rep. 443; *In re Doolittle* (1885), 23 Fed. Rep. 544; United States v. Cain (1885), 23 Fed. Rep. 748; Waterhouse v. Comer (1893), 55 Fed. Rep. 149; United States v. Debs, 63 Fed. Rep. 436, 64 Fed. Rep. 724.

<sup>22</sup> Farmer, etc. Co. v. Northern Pac. R. R. (1894), 60 Fed. Rep. 803; Arthur v. Oakes (1894), 63

Fed. Rep. 310; Waterhouse v. Comer (1893), 55 Fed. 149.

<sup>23</sup> Toledo, etc. v. Pennsylvania Co. (1893), 54 Fed. Rep. 730, 746.

<sup>24</sup> United States v. Haggerty (1902), 116 Fed. Rep. 510; Illinois, etc. Bank v. Minton (1902), 120 Fed. Rep. 187.

<sup>25</sup> Connor v. Tennessee, etc. Ry. (1901), 109 Fed. Rep. 931; George v. St. Louis, etc. Ry. (1890), 44 Fed. Rep. 117; East Alabama v. Doe (1885), 114 U. S. 340; Central Trust Co. v. Moran (1894), 56 Minn. 188, 29 L. R. A. 212; Lake Shore, etc. Ry. v. Grand Rapids (1894), 102 Mich. 374, 29 L. R. A. 195.

<sup>26</sup> Rutland Ry. Co. v. Chaffee, 72 Vt. 404; Gooch v. McGee, 83 N. C.

**§ 1065. Subscriptions, payable in bonds, by way of municipal aid in behalf of railroads.**—Municipal debts in the United States exceed one thousand millions of dollars, with constant increase in the amount.<sup>27</sup> These debts were largely incurred, in effect, as donations for the construction of railroads. A municipality has no inherent power to subscribe to stock in a corporation. To become stockholders in a private corporation, is manifestly foreign to the purposes intended to be subserved by the creation of corporate municipalities.<sup>28</sup> Without express legislative power conferred, a municipality has no power to subscribe to the stock of any other corporation.<sup>29</sup> General power to borrow money and issue bonds, even with the sanction of the voters at a general election, does not confer authority to subscribe for stock, or to make any donation to a corporation.<sup>30</sup> The attorney-general of the State may enjoin a municipality from issuing its bonds to a railroad company.<sup>31</sup> The attempt of a city to indirectly aid a railroad, was held not enforceable, where the city leased its waterworks to individuals, they agreeing to apply the monthly rental to the construction of a railroad.<sup>32</sup> The legislature has no power to authorize municipal aid to any other than a public corporation. Any such grant is unconstitutional and void.<sup>33</sup> For the purpose of such a grant, a railroad company is a public corporation.<sup>34</sup> A municipal corporation may be authorized to subscribe to the stock of a railroad, or any other *quasi-public* corporation,<sup>35</sup> but the legislature has no power to compel a municipality to issue its bonds in aid of any corporation.<sup>36</sup> Municipal subscription to the stock of a railroad company, may be made before its incorporation.<sup>37</sup> It may be made to any company which may first build a particular railroad.<sup>38</sup>

*Constitutional prohibition of municipal aid to corporations.*—Many States have by constitutional provisions prohibited municipi-

59. *Vide supra*, § 662a, ATTACHMENT AND EXECUTION UPON PROPERTY AND FRANCHISES OF RAILROADS.

<sup>27</sup> Dillon, Mun. Corp., §§ 156, 160.

<sup>28</sup> Dillon, Mun. Corp., § 161.

<sup>29</sup> Dixon County v. Field, 111 U. S. 83 (1884); Post v. Pulaski Co. (1892), 49 Fed. 628.

<sup>30</sup> Lynchburg v. Slaughter, 75 Va. 57 (1880).

<sup>31</sup> State v. Saline Co. Court, 51 Mo. 350 (1873), 11 Am. Rep. 454.

<sup>32</sup> Higgins v. City of San Diego (Cal. 1896), 45 Pac. 824.

<sup>33</sup> Cooley, Const. Lim., 261; Dillon, Mun. Corp. 12, 117, 153.

<sup>34</sup> Mitchell v. Burlington, 4 Wall. 270 (1866).

<sup>35</sup> Knox County v. Aspinwall, 21 How. 539 (1858).

<sup>36</sup> People v. Batchellor (1873), 53 N. Y. 128, 13 Am. Rep. 480; Cairo, etc. R. R. v. Sparta, 77 Ill. 505 (1895).

<sup>37</sup> Davies County v. Huide Koper (1878), 98 U. S. 98.

<sup>38</sup> North v. Platte County, 29 Neb. 447 (1890), 25 Am. St. Rep. 395.

pal aid to any other corporations;<sup>39</sup> but no such prohibition has any retrospective effect. It is prospective only.<sup>40</sup> The legislature cannot restrict municipalities in any power to tax, or in any other way to abridge their power to pay bonds, in aid of a railroad, which were authorized and issued before the adoption of any such constitutional prohibition.<sup>41</sup> A municipality, as a stockholder, is entitled to the same rights and privileges, and is subject to the same obligations, as in the case of an individual.<sup>42</sup> The subject of this section has already been fully treated herein, under chapter XI, on Subscriptions.<sup>43</sup>

<sup>39</sup> *Concord v. Portsmouth, etc.* (1875), 92 U. S. 625; *Wyscaver v. Atkinson* (1881), 37 Ohio St. 80; *Penn. R. R. v. Philadelphia*, 47 Pa. St. 189 (1864).

<sup>40</sup> *Katzeznberger v. Aberdeen* (1887), 121 U. S. 172; *Ralls County v. Douglass* (1881), 105 U. S. 728.

<sup>41</sup> *Pitzman v. Freeburg* (1879), 92 Ill. 111.

<sup>42</sup> *Foster v. Chesapeake, etc. Ry.* (1891), 47 Fed. 369; *Hancock v. Louisville, etc. R. R.* (1892), 145 U. S. 409; *Adams v. Natchez, etc. R. R.* (1899), 76 Miss. 714, 25 So. 667.

<sup>43</sup> *Vide supra*, § 223, to which the following decisions are added to those cited on pages 295 and 296 of that section, upon the question, whether in the absence of any express constitutional prohibition, the legislature may confer the power upon municipal corporations to subscribe to the capital stock of railroads or any other corporations, in respect of enterprises not of a wholly governmental or strictly public character:

*Arkansas: Chicot County v. Sherwood* (1893), 148 U. S. 529.

*California: Chaffee County v. Potter* (1892), 142 U. S. 355.

*Iowa: Doon v. Cummins* (1892), 142 U. S. 366.

*Kansas: Kansas City, etc. R. R. v. Rich Township* (1891), 45 Kan. 275; *Hutchinson, etc. R. R. v. Kingman County* (1892), 48 Kan. 70.

*Kentucky: Brown v. Tinsley* (Ky. 1893), 21 S. W. Rep. 535.

*Maine: Farmington Village Corp. v. Sandy River Nat. Bank* (1892), 85 Me. 46.

*Michigan: Risley v. Howell* (1893), 57 Fed. 544.

*Minnesota: Kimball v. Lakeland* (1890), 41 Fed. Rep. 289.

*Mississippi: Madison County v. Priestly* (1890), 42 Fed. Rep. 817; *Barnum v. Oklahoma* (1893), 148 U. S. 393.

*Missouri: State v. Hannibal, etc. R. R.* (1890), 101 Mo. 136.

*Nebraska: Nash v. Baker* (1893), 37 Neb. 713.

*Nevada: Lincoln County v. Luning* (1890), 133 U. S. 529.

*New Jersey: Bernard Township v. Morrison* (1890), 133 U. S. 523.

*North Carolina: Board of Commissioners, etc. v. Coler* (1902), 113 Fed. Rep. 705.

*Tennessee: City, etc. v. Chattanooga, etc. R. R.* (1897), 100 Tenn. 138.

*Virginia: Cumberland County v. Randolph* (1893), 89 Va. 614.

*Wisconsin: State v. Common Council* (Wis. 1897), 71 N. W. Rep. 86; *Northern Pac. R. R. v. Roberts* (1890), 42 Fed. Rep. 734; *Ellis v. Northern, etc. R. R.* (1890), 77 Wis. 114.

A county cannot donate land to a railroad. *Mercer County v. Provident, etc. T. Co.* (1896), 72 Fed. 623; *Travelers' etc. Co. v. Mayor, etc.* (1900), 99 Fed. 663; *State v. Morristown* (1893), 93 Tenn. 239.

## CHAPTER XLII.

### STREET RAILWAYS.

§ 1066. Electric corporations. Definitions of terms. Conduction. "Grounding" the wires. Trolley systems. Interference between electric wires. Underground wires. Conduits. Subways.	§ 1070. What are legitimate street uses. Rights of owners of property abutting on the streets. Elevated railways.
1067. Electric street railways.	1071. Powers, duties and liabilities of street railway companies. Use of salt on the tracks. Screen for motormen, when required. Riding on the "running board," car steps. Taxation of street car companies.
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§ 1066. **Electric corporations.** **Definitions of terms.**—The multiplying applications of electricity have resulted in a class called electric corporations. They include electric railways, telegraphs, submarine telegraph cables, wireless telegraph, telephone, electric light, and heat and power companies. An electric corporation is defined as one organized with express or implied power to generate, produce, develop, supply, or use electricity for effectuating the purposes for which its charter-powers are conferred.<sup>1</sup>

"*Conduction*" is the discharge of electricity by "grounding the wires" of one electric plant, of more powerful current, in a way to effect the more delicate current of another company's wires similarly "grounded." In this way, telephone service may suffer from the stronger currents used by electric light or electric railway companies; the effect of the conduction upon the telephone wires being a buzzing sound, often making conversation over the wires impossible.

"*Grounding the wires*" is using the earth for return of the electric circuit. It is a right common to all electric companies.<sup>2</sup>

*Trolley systems.* In the Sprague single trolley overhead system, "the electricity, operating the motors under the cars, is conveyed to them by a single overhead trolley wire and a single arm

<sup>1</sup> Joyce on Electric Law, p. 1. etc. Assn., 48 Ohio St. 380, 29 Am.

<sup>2</sup> Cincinnati, etc. Co. v. City, St. Rep. 559.

or pole, attached to the car and carrying a contact wheel, running along and pressing up underneath the trolley wire. The current passes down the pole or arm to the switch apparatus on board the car, through the motors, thence to the wheels, and to the tracks. It then passes back to the station along the iron rails of the track, interlaced together by conducting wires, and firmly connected by a conducting wire with the negative pole of the dynamo, the greater portion of the current flowing along this line of the track as the return current.”<sup>3</sup>

In this system, though the rails conduct the return circuit, the current escapes into the adjacent earth, sufficiently to affect other electric wires in the vicinity. The double trolley system uses two wires, one of which returns the current to the dynamo, without any contact with the earth. Though this system avoids the danger of conduction, it is more expensive and less efficient than the single-trolley system. The numerous decisions upon actions brought against electric railroad companies, for injunction or for damages, brought by other electric companies, in cases of injury by conduction and induction, substantially agree: that there can ordinarily be no recovery for damages for injuries caused by induction due to the use of overhead trolley wires, provided the defendant company has exercised reasonable care, and has not unnecessarily infringed upon the other’s rights; that priority of grant to use the street will not avail either company; and that no electric company has an exclusive right to the use of the earth-circuit.<sup>4</sup>

*Interference between electric-light and other wires.* The question of the respective rights of rival electric-light companies in the streets has often come up before the courts; and in effect they agree that the first company which, in the occupation of the streets and which also is first in the operation of its system, acquires no exclusive right to the use of the street, but does acquire the right not to be molested in its possession, where it occupies no more space than is reasonably necessary for the safe and successful operation of its line.<sup>5</sup> In Missouri, the defendant was enjoined from suspending its wires above those of plaintiff nearer than three

<sup>3</sup> Cincinnati, etc. Ry. Co. v. City, etc. Assn., 48 Ohio St. 390, 29 Am. St. Rep. 559.

<sup>4</sup> Joyce on Electric Law, § 510.

<sup>5</sup> Consolidated, etc. Co. v. People’s, etc. Co., 94 Ala. 372, 10 South. 440; Terre Haute, etc. Co.

v. Citizens’, etc. Co., Vigo County, Ind., Super. Ct., 6 Am. Elec. Cas. 193; Rutland, etc. Co. v. Marble, etc. Co., 65 Vt. 377, 20 L. R. A. 821, 36 Am. St. Rep. 868; Nebraska Tel. Co. v. York, etc. Co., 27 Neb. 284.

feet, and guards were ordered for the electric-light company's wires.<sup>6</sup> Similarly, in Texas, the limit of proximity of defendant's wires was placed at four feet.<sup>7</sup>

*Underground wires. Conduits.* The State may delegate to municipalities its police power to permit or require, in populous cities, electric wires to be laid below the surface of the street, in properly constructed conduits, or subways, thus relieving the streets from obstruction by the poles and from network of wires, so especially dangerous at the time of a serious fire. This requirement is enforceable against existing companies, whose poles and wires are already established, as well as against companies organized subsequent to adoption of the act, or ordinance; and the city may remove the poles and wires, if they are not removed by the companies. The requirement is not in conflict with the power of Congress with reference to post-roads, or with its power to control and regulate interstate commerce.<sup>8</sup>

*Subways.* Under authority to construct a subway in a city, for the transportation of passengers, the company may enter upon the public squares, commons, or grounds, for the purpose of such construction.<sup>9</sup>

**§ 1067. Electric Street railways.**—This country appears to be at the threshold of a startling revolution in transit methods, everything pointing to a rapid and profitable development of inter-urban transportation by electric car lines. An electric street-railway is a railway generally for passengers only, on which electricity is the motive power. The wheels of each car are moved by an electric motor, to which they are geared, or, more commonly by a motor-car, in charge of a motorman, which may draw one or more cars. Of the two distinct systems, in one the motor is operated by an electric current from a secondary or storage battery on the car, usually underneath the floor; in the other the current is conveyed from a dynamo at some point on the line, by means of conducting wires placed on poles, or in an underground conduit.<sup>10</sup> The motive power of street railways which at first was

<sup>6</sup> Western U. T. Co. v. Guernsey, etc. Co., 46 Mo. App. 120.

<sup>7</sup> Paris, etc. Co. v. Southwestern, etc. Co., Tex. Ct. App. (1894), 5 Am. Elec. Cas. 262.

<sup>8</sup> People *ex rel.* New York, etc. Co. v. Squire, 107 N. Y. 593, 145 U. S. 175; United States, etc. Co.

v. Hess, 19 N. Y. St. Rep. 883, 3 N. Y. Supp. 777; Western U. T. Co. v. Mayor, etc. Co., 38 Fed. 552; American, etc. Co. v. Hess, 125 N. Y. 641, 21 Am. St. Rep. 764.

<sup>9</sup> Prince v. Crocker, 166 Mass. 347.

<sup>10</sup> 2 Cent. Dict. 1868.

horse or mule power, then by endless cable, has generally given way to electricity, so that a street railway, with rare exceptions, is now an electric street railway. It is constructed and operated on the surface of the street, or above it, or below it, subservient to other street uses, and to the rights of public travel.<sup>11</sup>

**§ 1068. Change of motive power, of street railways.**—The power conferred on the city council to authorize the use of electricity as a motive power, carries with it the power to authorize the erection of poles on the edge of the sidewalk, notwithstanding the act of incorporation provides that "said corporation shall not incumber any portion of the streets occupied by said tracks;" such poles not being an incumbrance, but a necessity for the successful operation of the road. The change of the power by which a street railway is operated, from horse power to electricity, and the erection of poles necessary for its operation, does not impose an additional burden on the abutting property owners, or entitle them to damages.<sup>12</sup> In New Jersey, a municipality may authorize a street railway to use the trolley.<sup>13</sup> If chartered to use horses, it can not use electric power, even by consent of the local authorities.<sup>14</sup> If authorized to lay a cable line, and it uses only horses, the city may compel the company to use a cable line.<sup>15</sup> If the charter does not specify its motive power, it may use electricity and a trolley line.<sup>16</sup> If the company changes from horse power to trolley line, without the local consent required, the city can not be enjoined from removing the company's poles and wires.<sup>17</sup> Under a power to lay down and thereafter repair a horse railroad upon public streets, the company can not change its motive power to operate its road by means of a cable, when to do so will necessitate extensive excavation of the streets.<sup>18</sup> The constitution of New York, providing that no law shall authorize the construction or operation of a street railway, except by consent of the owners of

<sup>11</sup> *In re People's R. T. Co.*, 125 N. Y. 93; *In re New York Dist. Co.*, 107 N. Y. 22; Joyce on Electric Law, § 6.

<sup>12</sup> *Taggart v. Newport* (1890), 16 R. I. 668, 19 Atl. 326, 7 L. R. A. 205; *Nagel v. Lindell Ry.* (1902), 167 Mo. 89; *Southern Ry. v. Atlanta, etc. Co.* (1900), 111 Ga. 679, 51 L. R. A. 125; *Osborne v. Missouri Pac. Ry.* (1893), 147 U. S. 248.

<sup>13</sup> *Paterson v. Grundy* (1893), 51 N. J. Eq. 213.

<sup>14</sup> *Harris v. Twenty Second, etc. Ry.* (1892), 1 Pa. Dist. 506.

<sup>15</sup> *Spokane St. Ry. v. Spokane Falls* (1893), 6 Wash. 521, 32 Pac. 456.

<sup>16</sup> *Halsey v. Rapid, etc. Ry.* (1890), 47 N. J. Eq. 380.

<sup>17</sup> *Paterson Ry. v. Grundy* (1893), 51 N. J. Eq. 213.

<sup>18</sup> *People v. Newton* (1889), 112 N. Y. 396, 3 L. R. A. 174.

one-half the value of the abutting property, and also of the local authorities in control of the street on which it is proposed to construct or operate such railroad, applies not only to proposed street railroads, but also to construction, undertaken by corporations on their existing lines of railroad. Therefore, a law authorizing any surface railroad to operate its road by cable or electricity, instead of animal or horse power, on consent of the owners of one-half in value of the abutting property, is unconstitutional, in that it dispenses with the consent of the local authorities.<sup>19</sup> Upon the application of a petitioner for permission to make such a change, claiming that it did not seek to construct or operate a new road, but simply to change the motive power in the operation of a road which it had already the right to maintain and operate, it was held that the proposed change from horse power to cable power involved the building of an absolutely new road, subjecting the streets of the city to new burdens, which, under its original franchise the petitioner had no right to impose.<sup>20</sup> A street railway has implied power to use horses or electricity as motive power, but it can not change from either power to a cable, without express authority to make the change.<sup>21</sup> An act providing for the construction of a system of pneumatic tubes for the transmission of letters, packages and merchandise by atmospheric pressure, can not be constitutionally amended under the same title, to allow the construction of a railway to traverse an immense tubular tunnel for the transportation of passengers, the subject of the amended act not being consonant with its title.<sup>22</sup> Where an act, incorporating a street-railway company, provides that the "tracks or road shall be operated and used by the corporation with steam, horse, or other power, as the city council may, from time to time, direct," the city may, after notice has been given, and an ordinance passed, permitting the use of horse-power, pass a second ordinance, without further notice, changing the power to electricity.<sup>23</sup> If the city has power to authorize "horse and steam railways," it may empower a railway company to use "electric" power.<sup>24</sup> An abut-

<sup>19</sup> People v. Gilroy (1890), 9 N. Y. Supp. 833. (1889), 113 N. Y. 93. *Vide supra*, §§ 61, 63.

<sup>20</sup> People v. Gilroy (1890), 9 N. Y. Supp. 833. 23 Taggart v. Newport Street Ry. Co. (R. I. 1890), 19 Atl. Rep. 326, 7 L. R. A. 205.

<sup>21</sup> People v. Newton (1888), 48 Hun, 477, 112 N. Y. 396 (1889), 3 L. R. A. 174. 24 Buckner v. Hart (1892); 52 Fed. Rep. 835.

<sup>22</sup> Astor v. Arcade Ry. Co.

ting property owner, can not enjoin a horse railway company from using electricity as motive power.<sup>25</sup> Under general power to regulate street railways in their use of the streets, a city may consent to the change by a street railway company from use of horse cars to that of electricity.<sup>26</sup> Where the constitution required consent of the local authority to the laying down of tracks by a city railway, such consent was held to be unnecessary, where the legislature authorized a company to lay a street cable as its motive power.<sup>27</sup>

**§ 1069. Authority to use the highways and streets.**—The primary law of a highway is motion. The principal right therein is the right of passage. The primary object of a highway is for public travel. Anything that tends to promote the traveler's safety, convenience, or comfort, is to him a benefit, and is a proper use of the highway. Such a use is not an additional servitude, and is not a use, entitling the abutting property owner to compensation.<sup>28</sup> The fee to the streets of a municipality, as in the case of a city, is in the city, where it was originally laid out by the federal government, or by any of its predecessors, or under the federal town-site laws. The fee is in the abutting property owners, where the city was laid out by dedication of the streets, by private owners, holding the land by entry of the public domain under acts of congress, or under private land-grant, made by some prior sovereignty. Where the fee to the streets is vested in the city, as it is in the City of New York, it is held in trust to be appropriated and held open as public streets. The power of the legislature over the public streets, is limited to a regulation of the use, for which the property is held by the city in trust.<sup>29</sup> Upon the platting of an addition to the city, the fee simple vests in the public, to hold the streets and alleys in trust for the uses to which they are dedicated.<sup>30</sup> No street railway was incorporated otherwise than under general railroad acts, until in New York in 1889, an act was adopted for the incorporation of street railway companies.<sup>31</sup> The legislature

<sup>25</sup> Detroit City Ry. v. Mills (1891), 85 Mich. 634.

<sup>26</sup> Hudson, etc. Tel. Co. v. Water-vliet, etc. Ry. (1893), 135 N. Y. 393, 17 L. R. A. 674, 31 Am. St. Rep. 838.

<sup>27</sup> *In re Third Ave. R. R.* (1890), 121 N. Y. 536, 9 L. R. A. 124.

<sup>28</sup> Palmer v. Larchmont, etc. Co.,

158 N. Y. 231, 43 L. R. A. 672.

<sup>29</sup> Metropolitan, etc. Co. v. Colwell L. Co., 67 How. (N. Y.) 365.

<sup>30</sup> Jaynes v. Omaha, etc. Co., 53 Neb. 631, 39 L. R. A. 751, 74 N. W. 67.

<sup>31</sup> People v. Third Ave. R. R. (1889), 112 N. Y. 396, 3 L. R. A. 174.

alone possesses the power to authorize construction of a street railway. It can exercise the power without consent of the municipality.<sup>32</sup> A city has no implied power, as a municipality, to grant a franchise to a street railway company to use the streets. As to street railways in Illinois, under the constitution of 1870, which required consent of the local authorities to the construction of a street railway, the home-rule policy was adopted by act of 1872, giving the local municipalities the power to permit, for any period of twenty years, or to prohibit the construction of street railways. It took effect from the date of the vote of the city or town accepting the grant, and not from the date when the vote was counted and declared. Under this act, the federal court held, as to certain ordinances of the city of Chicago, that those ordinances, designating certain streets for construction of a street railway, under grant by the legislature, which ordinances were passed prior to the time when the city was given power to permit or prohibit use of the streets for construction of a railway, and which power the company accepted and acted upon—constitute a grant terminable by neither party, without consent of the other, during the life of the legislative grant; but that, as to streets, occupied under ordinances passed after the city was given plenary power to grant permission for their said use,—*held* the contract relation depends solely upon the ordinances themselves, and independant of the legislative grant. In a legislative grant to a street railway, the terms, "franchise," "license" and "contract" are to be distinguished. "Franchise" is the authority to occupy the street; "license" is a designation by the city of the streets to be accepted, and "contract" is the stipulated arrangement between the company and the city, as to the manner of occupancy.<sup>33</sup> A legislative grant to a railway company, to use the streets of a city, is, generally, a grant in *presenti*, which, when the particular street or streets are designated by the city, the grant attaches, as to those streets, of the date of the statute.<sup>34</sup> Only under power

<sup>32</sup> Peoples' R. R. Co. v. Memphis R. R. (1860), 10 Wall. 38; Chicago v. Evans (1860), 24 Ill. 52; State v. Mayor, etc. (1854), 3 Duer (N. Y.), 119.

<sup>33</sup> Transit Company v. Chicago, U. S. Circuit Court of Appeals, 7th dist., May, 1904.

<sup>34</sup> United States v. Southern Pac. R. R., 146 U. S. 593; St. Paul & Pac. etc. v. Northern Pac. etc., 139 U. S. 5; Atlantic City, etc. v. Consumers' W. Co., 47 N. J. 427; Galveston R. R. Co. v. Galveston, 90 Tex. 398, 39 S. W. 96, 39 L. R. A. 33; Citizens' St. R. R. v. City of Memphis, 53 Fed. Rep. 715.

expressly delegated by the legislature to the municipal corporation, can a city exercise the right of eminent domain, in granting to a street railway corporation the use of designated streets for operation of its railway.<sup>35</sup> The legislature, independent of the city, may grant such power directly to the railway company,<sup>36</sup> or may grant to any railroad corporation the right to cross the streets of a city.<sup>37</sup> Without legislative authority for its use of the streets, a street railway is a nuisance, to be abated at the instance of any citizen suffering injury thereby.<sup>38</sup> Under whatever authority, when it is once accepted and acted upon by the company, in the construction of its railway, its right to operate it, is not a mere license, revocable, but is a franchise, and irrevocable contract, which is protected by the United States constitution against impairment in any way.<sup>39</sup> "It may not be out of place, in this connection, to say that the great number of cases in which it has become necessary for the courts to rule upon the question, furnishes a somewhat suggestive lesson as to the freedom with which municipal legislatures, in this country, have undertaken to strike down enterprises, which they were anxious to encourage in the first instance, with liberal grants, and large declarations of good faith."<sup>40</sup> The right of way, granted to use the street for a railway, is an easement, a property right, and vested interest, for the term of the corporate existence.<sup>41</sup> The legislature may revoke the charter, if it reserved the power to revoke it; but a city has no such power, under its general power to repeal its ordinances.<sup>42</sup> Upon a dissolution of the corporation, its contract right to use the streets, does not revert to the State, but, as an asset, survives to the stockholders, after payment of the corporate

<sup>35</sup> *Potter v. Collins* (1893), 156 N. Y. 16; *State v. Mayor, etc.* (1854), 3 Duer, 119.

<sup>36</sup> *Philadelphia v. Empire Railway* (1869), 3 Brewst (Pa.), 547; *State v. Jacksonville St. R. R.* (1892), 29 Fla. 590, 10 South. 590.

<sup>37</sup> *Allen v. Jersey City* (1891), 53 N. J. L. 522. *Vide supra,* § 1040.

<sup>38</sup> *Fanning v. Osborne* (1886), 102 N. Y. 441.

<sup>39</sup> *St. Louis v. Western, etc. Co.* (1893), 148 U. S. 92; *Town of Mason v. Ohio, etc. R. R.* (1902), 51 W. Va. 183, 41 S. E. 418; *Pikes*

*Peak, etc. Co. v. Colorado Springs* (1900), 105 Fed. Rep. 1; *American, etc. Co. v. Home, etc. Co.* (1902), 115 Fed. Rep. 171; *Mercantile, etc. Co. v. Collins Park, etc. R. R.* (1900), 99 Fed. Rep. 812.

<sup>40</sup> *Africa v. Knoxville* (1895), 70 Fed. Rep. 729.

<sup>41</sup> *Detroit, etc. St. Ry. v. Detroit* (1894), 64 Fed. Rep. 628; *Knoxville v. Africa* (1896), 77 Fed. Rep. 501.

<sup>42</sup> *Baltimore Trust Co. v. Baltimore* (1894), 64 Fed. 153.

creditors.<sup>43</sup> Without power expressly granted by the legislature, a city can not grant an exclusive right to a street railway company.<sup>44</sup> An exclusive right granted to a street railway, to run horse cars on certain streets, does not preclude the operation of street cars by other power, as, by cable, or electric power, upon the same street.<sup>45</sup> Although there are street railway tracks already in a street, other tracks may be authorized to be laid by other companies.<sup>46</sup> A city can not grant the right to lay railway tracks across a street for the private use of any individual or corporation.<sup>47</sup> The State may forfeit the charter for non-compliance with its conditions, as, for failure to complete the prescribed line,<sup>48</sup> or for failure to pave the prescribed part of the street.<sup>49</sup> A municipality can not delegate its power to authorize the establishment of a street railway.<sup>50</sup> The use of a street by a horse railroad company, is a mere modification of an existing servitude. The servitude is not new, because the vehicle is new. It is simply the right to lay tracks, in streets already appropriated to the uses of public travel for the purpose of facilitating such travel.<sup>51</sup> It is not competent, however, for a railway to be constructed for private use through the streets of a city, even with the consent of the city, and a perpetual injunction will lie in favor of any abutting property-owner, who would be injured thereby.<sup>52</sup> The operation of a street railroad by mechanical power, when authorized by law, on a public street, is not an additional servitude or burden, on land already dedicated or condemned to the use of a public street, and is therefore not a taking of private property, but is a modern and improved use, only, of the street as a public highway, and affords to the owner of the abutting property, though he may own the fee of the street, no legal ground of complaint.<sup>53</sup> The difference between railroads for general traffic and

<sup>43</sup> Greenwood v. Freight Co. (1881), 105 U. S. 13; Henderson v. Central, etc. Ry. (1884), 21 Fed. Rep. 358.

<sup>44</sup> Clarksburg v. City of Clarksburg (1900), 47 W. Va. 739, 35 S. E. 904.

<sup>45</sup> Thirteenth, etc. Ry. v. Southern Pass. Ry. (1893), 3 Pa. Dist. 337; Teachout v. Des Moines, etc. Ry. (1888), 75 Iowa, 722.

<sup>46</sup> Koch v. North Ave. Ry. (1892), 75 Md. 222, 15 L. R. A. 377.

<sup>47</sup> Glaessner v. Anheuser-Busch, etc. Assn. (1890), 100 Mo. 508;

Gustafsen v. Hamm (1894), 56 Minn. 334, 22 L. R. A. 565.

<sup>48</sup> People v. Broadway R. R. (1891), 126 N. Y. 29.

<sup>49</sup> Union St. Ry. v. Snow (1897), 113 Mich. 694.

<sup>50</sup> State v. Bell (1877), 34 Ohio St. 194.

<sup>51</sup> Mills on Em. Dom., § 205, and cases cited.

<sup>52</sup> Mikesell v. Durkee, 34 Kan. 509.

<sup>53</sup> Williams v. City Electric, etc. Ry. Co. (1890), 41 Fed. Rep. 556, 7 Ry. & Corp. L. J. 448; Briggs

street railroads, consists in their use, and not in their motive power. A railroad, the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the public is not excluded from the use of any part of the street as a public way; which runs at a moderate rate of speed, compared to the speed of traffic railroads; which carries no freight, but only passengers, from one part of a thickly populated district to another in a town or city, and its suburbs, and for that purpose runs its cars at short intervals, stopping at the street crossings to receive and discharge its passengers—is a street railroad, whether the cars are propelled by animal or mechanical power. Accordingly, where a city is authorized, by its charter, to contract for the construction of street railroads, it may authorize railroads of that character to be operated by animal, or mechanical power.<sup>54</sup> But, in determining whether or not cable

v. Lewiston, etc. R. Co., 79 Me. 363; Newell v. Minneapolis R. Co. (1886), 35 Minn. 112; People v. Kerr, 27 N. Y. 204.

<sup>54</sup> Williams v. City Electric Street Ry. Co. (1890), 41 Fed. Rep. 556, 7 Ry. & Corp. L. J. 448, where the court said: "The difference between street railroads and railroads for general traffic is well understood. The difference consists in their use, and not in their motive power. A railroad, the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the public is not excluded from the use of any part of the street as a public way; which runs at a moderate rate of speed, compared to the speed of traffic railroads; which carries no freight, but only passengers, from one part of a thickly populated district to another in a town or city and its suburbs, and for that purpose runs its cars at short intervals, stopping at the street crossings to receive and discharge its passengers, is a street railroad, whether the cars are propelled by animal or mechanical power. The propelling power of such a road may be animal, steam, electricity,

cable, fireless engines or compressed air—all of which motors have been and are now in use for the purpose of propelling street cars. Encyclop. Britannica (9th ed.), tit. 'Tramways.' Doubtless other methods of propelling the cars of street railroads will be discovered and applied. The legislature having empowered the city to authorize the construction of street railroads, without qualification or restrictions as to the motive power to be used on such roads, the city had the undoubted right to authorize animal or mechanical power to be used as motors on such roads. Sections 5468-5471, Mansf. Dig., relate to railroads for the general traffic, and not to street railroads, whether propelled by animal or mechanical power. It would be a useless consumption of time to cite authorities to show that it would be competent for the city, under its charter, to authorize the construction and operation on the streets of the city, of a street railroad propelled by animal power, without providing for compensation to the abutting lot owners; but the learned counsel for the plaintiff insists that the rule is

railways should be constructed through certain streets in New York city, the company assuming to act under a certain statute authorizing steam railroads in streets, it was held that it would prove too great an inconvenience to the public, as to some of the more narrow streets; and that cable railways did not fall within the meaning of the act.<sup>56</sup> The provision of the New York constitution, setting forth certain conditions to be complied with, in the building of street railways, does not preclude the legislature from imposing other conditions.<sup>58</sup> So, no rights are vested under the statute, under which a company assumes to act, which could not be impaired by a subsequent statute covering the same subject, and passed before the right to construct has been acquired; and the case is not affected by the mere fact that a large sum of money has been expended for the services and expenses of the commissioners.<sup>57</sup> But, where a street railway company is empowered, by its charter, to construct its road along such streets as a municipal corporation shall authorize,—the corporation, by delegating that authority, enters into a contract, which it has no power, by a subsequent act, to rescind.<sup>58</sup> And, where a street railway was built, and operated, under a general act of the legislature, by which it was relieved from repairing the street outside

different where the propelling power is steam. The distinction attempted to be drawn between animal and mechanical power as applied to street railroads, is not sound. The motor is not the criterion. It is the use of the streets and the mode of that use. A street railroad propelled by animal power might be so constructed and operated as to be a public nuisance, and render its owners liable to those injured by its improper construction and operation. The same is true of a street railroad operated by mechanical power. It may be so constructed and operated as to be a public nuisance, but the use of steam on such a railroad, when authorized by law, does not *per se* make it a nuisance, or entitle the owners of the abutting property to compensation, though the fee of the street is vested in them. It is common

knowledge that steam motors for operating street railroads are now constructed to emit so little gas, steam, or smoke, and make so little noise, that they do not constitute any reasonable ground of complaint to passengers or the public. They can be stopped and started as quickly and as safely as horse-cars, and in some respects can be operated with greater accuracy and precision. Such motors are in use in cities and their suburbs in this country and in England. *Encyclop. Britannica* (9th ed.)"

<sup>56</sup> *In re New York Cable Ry. Co.*, 40 Hun, 1.

<sup>58</sup> *In re Thirty-Fourth Street R. Co.*, 102 N. Y. 343; N. Y. Const., art. iii, § 13.

<sup>57</sup> *In re New York Cable Ry. Co.*, 40 Hun, 1.

<sup>58</sup> *People v. Chicago West Division Ry. Co.*, 18 Ill. App. 125.

its tracks, and an ordinance was afterwards passed by the city council, requiring railroads to repair the streets for a distance of one foot beyond their tracks, (subsequently to which the company was authorized by the city to extend its road,) the ordinance was held to apply to the extension.<sup>59</sup> In Louisiana, the right of a street railway company to use the public streets, may be assigned by mortgage.<sup>60</sup> Upon requirement by the city, that the street railway company should relay the pavement of a street, the company, for that purpose, tore up the pavement, whereupon the city removed the material, and required the company to replace it by new material, and the city was held liable to the railway company for its proper cost.<sup>61</sup> The grant, by a city ordinance to a street railway, of the privilege for years to construct and operate its road on such streets as the city might designate, from time to time, is not extended by subsequent permission to use a designated street.<sup>62</sup> Grant to a street railway company, to construct, within a certain time, its road through a village, and to construct a branch line, that it afterward built to the village limits, was not forfeited by failure to build the branch line within the time prescribed for construction of the road through the village.<sup>63</sup> The agreement of an electric street railway, to give to an owner of property, abutting on the street, a valuable option for purchase of the company's stock and bonds, as consideration for his assent to the construction of the railway in a public street,—was held void, as in violation of public policy.<sup>64</sup> A street railway, required to have a continuous route, does not comply with that requirement of its charter by location of a portion of its line on a street, already occupied by another street railway, over whose tracks it has no right to run.<sup>65</sup> A requirement in a city charter, of a street railway corporation, that it shall pay the cost of paving between its rails, and for two feet either side of its tracks, is not contrary to the constitution.<sup>66</sup> Failure of street railway corporation to complete its construction within a specified time, does not lose its

<sup>59</sup> St. Louis v. Missouri R. Co., 13 Mo. App. 524,

<sup>60</sup> New Orleans, etc. R. Co. v. Delamore, 114 U. S. 501.

<sup>61</sup> City of Detroit v. Detroit Ry. (Mich. 1904), 99 N. W. 411.

<sup>62</sup> Thurston v. Houston (Iowa, 1904), 98 N. W. 637.

<sup>63</sup> Houghton, etc. v. Common

Council, etc. (Mich. 1904), 98 N. W. 393.

<sup>64</sup> Montclair, etc. Academy v. North, etc. Ry. Co. (N. J. 1904), 57 Atl. 1050.

<sup>65</sup> Altoona, etc. Co. v. City Pass. etc. Co. (Pa. 1904), 58 Atl. 477.

<sup>66</sup> Kettle v. City of Dallas (Tex. Civ. App. 1904), 80 S. W. 874.

right, by expiration of the time, where its delay is due to injunction, granted at the instance of a competitor.<sup>67</sup>

**§ 1070. What are legitimate street uses. Rights of owners of abutting property.**—Among the necessary and proper uses of streets, but which would not necessarily be uses of a rural highway, are: horse railways,<sup>68</sup> or electric railways for ordinary travel, sewers, pipe-lines for conveyance of gas or water,<sup>69</sup> appliances for street lighting<sup>70</sup> by gas or by electric light. These uses are not an additional burden upon the abutting property owners, entitling them to compensation. But, as the construction of telegraph and telephone lines, and electric-power lines, upon highways or streets, is, according to the weight of authority, not within the original purposes of highways or streets, it follows, that the placing of poles or wires therein, for such electric purposes, constitutes an additional servitude, which entitles the abutting property owner to compensation. The owner of property, fronting on a street, whether he owns to the center of it, or not, is not entitled to damages, for use of the street, or injury to his property, by reason of the authorized occupation of the street by such a railway.<sup>71</sup> “Whether the motive power of the cars be horses, electricity, or a submerged cable, makes no difference in the use, and no one of these modes of use confers any right of action upon the abutting property owner.”<sup>72</sup> In New York it is held, that where the fee to the street is not in the city, but in the abutting property owner, he is entitled to compensation.<sup>73</sup> If the railway destroys access to abutting property, damages may be recovered.<sup>74</sup> Where the horse-railroad uses steam, the abutting property owners may recover damages.<sup>75</sup> An elevated railroad is a new use of the street, for which abutting property owners may recover damages.<sup>76</sup> Excepting in New York, abutting prop-

<sup>67</sup> *Newport News, etc. v. Hamp-ton Roads, etc. Co.* (Va. 1904), 47 S. E. 839.

<sup>68</sup> *Craig v. Rochester R. Co.*, 39 N. Y. 404.

<sup>69</sup> *Commonwealth v. Lowell G. L. Co.*, 12 Allen (Mass.), 75.

<sup>70</sup> *Harlem G. L. Co. v. Mayor, etc.*, 33 N. Y. 327.

<sup>71</sup> *Barney v. Keokuk* (1876), 94 U. S. 324.

<sup>72</sup> *Rafferty v. Central, etc. Co.* (1892), 147 Pa. St. 579, 30 Am. St. Rep. 763.

<sup>73</sup> *Reining v. New York, etc. R. R.* (1891), 128 N. Y. 157, 14 L. R. A. 133.

<sup>74</sup> *Evans v. Chicago, etc. Ry.* (1893), 86 Wis. 597, 39 Am. St. Rep. 908; *Atchison, etc. R. R. v. Davidson* (1894), 52 Kan. 739, 35 Pac. 787.

<sup>75</sup> *Hussner v. Brooklyn, etc. R. R.* (1889), 114 N. Y. 433, 11 Am. St. Rep. 679.

<sup>76</sup> *Koch v. North Ave. Ry.* (1892), 75 Md. 222, 15 L. R. A. 377.

erty owners upon a street railroad, operated by overhead electric system, are not entitled to damages.<sup>77</sup> In Pennsylvania and Wisconsin, an electric railway, for freight, as well as passengers, on a country highway, has been held to be an additional burden, especially where it changes the grade of the road.<sup>78</sup> But in such case, if the fee be in a turnpike company, the abutting property owners are not entitled to damages.<sup>79</sup> An elevated railway may be constructed in the street, without right of the abutting property owner to enjoin;<sup>80</sup> but it is an occupation of the street, for a new use, and entitles an abutting property owner to damages, in a suit at law<sup>81</sup>.

**§ 1071. Powers and liabilities of a street-railway company.—**

The general rights, duties, and liabilities of electric, and other street railways, are analogous to those of railroads. While they differ in manner of construction and operation, like general rules and principles of law apply to them all. A street railroad can not sell its property, without express authority.<sup>82</sup> A street railroad, as purchaser of another street railroad and its property, is not bound to honor passes by it issued, although issued in consideration of rights of way.<sup>83</sup> Under the New York statute, a lease of all the street railway system of the city, to a company, organized expressly for that purpose, was held legal. Although no cash was paid, the lessor guaranteed seven per cent dividends upon its stock, and its shareholders received an option, to subscribe for stock in the new company.<sup>84</sup> A sale of a street railroad, under authority of statute, passes with it a special contract with the city, as to taxation of its property.<sup>85</sup> The transfer by a street

<sup>77</sup> *Nagel v. Lindell Ry.* (1902), 167 Mo. 89; *La Crosse, etc. Ry. v. Higbee* (1900), 107 Wis. 389, 51 L. R. A. 923; *Howe v. West End St. Ry.* (1896), 167 Mass. 46; *Taylor v. Portsmouth, etc.* (1898), 91 Me. 193, 64 Am. St. Rep. 216.

<sup>78</sup> *Zehren v. Milwaukee, etc. Co.* (1898), 99 Wis. 83, 41 L. R. A. 575; *Pennsylvania R. R. v. Montgomery, etc. Ry.* (1895), 167 Pa. St. 62, 27 L. R. A. 766; 46 Am. St. Rep. 659.

<sup>79</sup> *Green v. City, etc. Ry.* (1894), 78 Md. 294, 44 Am. St. Rep. 288.

<sup>80</sup> *Doane v. Lake Street, etc. R. R.* (1896), 165 Ill. 510, 36 L. R. A. 97, 56 Am. St. Rep. 265; *Leben-*

*stone v. Union Elev. R. R.* (1897), 80 Fed. Rep. 9; *Blodgett v. Northwestern, etc. Ry.* (1897), 80 Fed. Rep. 601.

<sup>81</sup> *Koch v. North Ave. Ry.* (1892), 75 Md. 222, 15 L. R. A. 377.

<sup>82</sup> *Pittsburg, etc. R. Co. v. Allegheny Co.*, 63 Pa. St. 126, 79 Pa. St. 210.

<sup>83</sup> *Wallace v. Ann Arbor, etc. Ry.* (1899), 121 Mich. 588, 80 N. W. 572.

<sup>84</sup> *Content v. Metropolitan, etc. Ry.* (1902), 37 N. Y. Misc. Rep. 618.

<sup>85</sup> *Detroit, etc. Ry. v. Common Council* (1901), 125 Mich. 673, 84 Am. St. Rep. 589.

railway, of all its property to another street railroad company, for its bonds and stock to be divided among the shareholders of the vendor company, is a consolidation, and not a sale.<sup>86</sup> A street railway corporation may build part of its line upon land purchased, aside from a street or highway.<sup>87</sup> But it can not condemn land, under general statutes authorizing railroads to take private property for railway right of way.<sup>88</sup> A street railway may cross railroad tracks without paying damages,<sup>89</sup> or may cross a toll bridge, on payment of proper tolls.<sup>90</sup> Street cars in use of the company's tracks, have priority of right over other vehicles and pedestrians. They must be vigilant, not to obstruct the passage of cars.<sup>91</sup> The fares a street railway company may charge, are subject to reduction by the legislature or city government, as in cases of other railroads. If, by its contract with the city, its fare, between any two points, was to be five cents, it can not exceed that charge, upon a railway line it may afterwards acquire, which was authorized to charge ten cents.<sup>92</sup>

*Transfer tickets.*—A street railway can not be compelled to give transfer tickets from one car to another, unless it was originally required, by its charter, to do so.<sup>93</sup> The power of legislative control by the city over street railways, is as extensive, as is that of the legislature over railroads generally. The mortgage trustee, who took possession and operated a street railway on default, paid striking employes wages past due as condition to their resuming work, and paid rent falling due after he took possession, was allowed the expenses, as entitled to priority over the mortgage.<sup>94</sup> Where the statute and contract provided, that the rapid transit road and tunnels should be paid for and owned by the city, and that the equipment, rolling stock, and operating mechanism should belong to the contractor, and thereafter the commissioners, determining electricity as the motive power, necessitated widening the tunnel,—the court held, the expense of change to be a part of

<sup>86</sup> *Shadford v. Detroit, etc. Ry.* (Mich. 1902), 89 N. W. 960; *Content v. Metropolitan, etc. Ry.* (1892), 37 N. Y. Misc. Rep. 618.

<sup>87</sup> *Farnum v. Haverhill, etc. Ry.* (1901), 178 Mass. 300.

<sup>88</sup> *Thomson-Houston, etc. Co. v. Simon* (1890), 20 Oreg. 60, 25 Pac. 147, 10 L. R. A. 251, 23 Am. St. Rep. 26.

<sup>89</sup> *Chicago, etc. Ry. v. Whiting, etc. Ry.* (1894), 139 Ind. 297, 26 L. R. A. 337, 47 Am. St. Rep. 264.

<sup>90</sup> *Detroit, etc. Ry. v. Commissioner, etc.* (1901), 127 Mich. 219.

<sup>91</sup> *Hennessy v. Brooklyn City R. R.* (1893), 73 Hun, 569, 147 N. Y. 721.

<sup>92</sup> *Adams v. Union R. R.* (1899), 21 R. I. 134, 42 Atl 515, 44 L. R. A. 273.

<sup>93</sup> *City of Atlanta v. Old Colony, etc.* (1898), 88 Fed. Rep. 859.

<sup>94</sup> *Mersick v. Hartford, etc. Co.* (Conn. 1903), 55 Atl. 664.

the cost of construction, to be paid for by the city.<sup>95</sup> Where the complaint against a street railway, for the killing of a dog, in one count alleged that the defendant, in operating its railway by one of its agents and employes, "did recklessly, wantonly, and wilfully, run over, and kill" the dog, belonging to plaintiff, it was held sufficient averment of negligence by defendant.<sup>96</sup> If one is injured by taking hold of an electric wire, not properly insulated, he is not guilty of contributory negligence, but the company is *prima facie* liable in damages.<sup>97</sup>

*Use of salt on the tracks.*—Under its police power, a municipality may prohibit the use of salt on the tracks of street railways.<sup>98</sup>

*Screen for motorman.*—It may compel the use of screens or other protection, of motormen on electric street railways, against the inclemency of the weather.<sup>99</sup>

*Riding on the "running board" or car steps.*—It is not contributory negligence for a passenger, on a crowded street car, to ride on the steps, or on the "running board," or platform, of the car; but it is contributory negligence to ride on the bumper of an electric car, for the bumper is for the sole purpose of relieving against the shock of contact between cars.<sup>1</sup>

*Taxation of street car companies.*—The rails, poles, and wires, of an electric street railway erected in a public highway, are taxable as real estate.<sup>2</sup> The fact, that the township authorities take no action, in case of negligence in the construction of a street railway line along its highway, is not a ratification, relieving the company from liability.<sup>3</sup> A resolution of the city council, authorizing a street railroad company to construct a railway in certain streets, on condition that it pave them, and keep them in repair, within the car tracks and three feet on either side, with certain stone to be named by the council, is not a contract between the city and the railway, but a requirement, which may be amended any time, by the council, by requirement that the street be repaved with other materials, and that the railway should pay a portion of the cost.<sup>4</sup>

<sup>95</sup> *In re McDonald* (N. Y. 1903), 67 N. E. 1085.

<sup>96</sup> *Huntville, etc. Co.* (Ala. 1903), 34 So. 855.

<sup>97</sup> *Thomas v. Wheeling, etc. Co.* (W. Va. 1903), 46 S. E. 217.

<sup>98</sup> *State, etc. Co. v. Elizabeth,* 58 N. J. L. 619, 32 L. R. A. 170.

<sup>99</sup> *State of Minnesota v., Hoskins,* 58 Minn. 35.

<sup>1</sup> *Bard v. Pennsylvania Traction Co.*, 176 Pa. St. 97.

<sup>2</sup> *In re Toronto Ry. Co.*, 25 Ont. App. 135.

<sup>3</sup> *Kaiser v. Detroit, etc. Ry.* (Mich. 1904), 99 N. W. 743.

<sup>4</sup> *Binninger v. City of New York* (1904), 177 N. Y. 199.

## CHAPTER XLIII.

### ELECTRIC LIGHT, ELECTRIC POWER.

§ 1072. Electric light company.	§ 1076. (d) Taxation of its property as personality.
1073. (a) When a manufacturing company.	1077. Electric power company.
1074. (b) The company's rights, duties, and liabilities. Injuries from "live wires."	1078 (a) Riparian rights. Use of flowing water for power.
1075. (c) Legislative control of electric companies.	1079. (b) Condemnation of land for reservoir sites and dams.

**§ 1072. Electric light company.**—An electric light company is a corporation or association formed for the purpose of supplying electricity for illuminating purposes ; and by statute it may also supply electricity for purposes of heat and power. Its electricity is generated by a magneto or electric machine. The light is either arc light or incandescent.<sup>1</sup>

**§ 1073. (a) When a manufacturing company.**—In Maryland an electric corporation, organized to furnish light, heat, and power for public and private uses, and which generates its own electricity, is not taxable as a purely manufacturing company.<sup>2</sup> In Colorado it is a manufacturing company, with power to condemn land for right of way, for conducting water, for power to operate its plant,<sup>3</sup> and it is a manufacturing corporation in New York.<sup>4</sup>

**§ 1074. (b) The company's rights, duties and liabilities. Injuries from "live wires."**—An electric light corporation, like other *quasi-public* corporations, has only such right, as are granted directly by the legislature, or indirectly by a municipality. A city ordinance granting use of the streets to an electric light company, on condition of acceptance in writing, becomes a contract upon such acceptance.<sup>5</sup> An ordinance granting such permission to use the streets, without making the right exclusive, is a mere license.<sup>6</sup> Without express power to do so, a municipal

<sup>1</sup> Cent. Dict., p. 1867.

<sup>2</sup> Frederick, etc. Co. v. Frederick, 84 Md. 599.

<sup>3</sup> Lanborn v. Bell, 18 Colo. 346.

<sup>4</sup> People, etc. Co. v. Wemple, 129 N. Y. 664, 6 L. R. A. 303.

<sup>5</sup> City of Baxter Springs v. Baxter Springs, etc. Co. (Kan. 1903), 68 Pac. Rep. 63.

<sup>6</sup> Crowder v. Sullivan (1891), 128 Ind. 486, 13 L. R. A. 647.

corporation can not grant any such exclusive right.<sup>7</sup> If the city is authorized to grant such license, under restrictions it may impose, it may retain the right to revoke it at any time, and remove the company's poles from the streets;<sup>8</sup> but without such reserved power of revocation, the city can not erect its own lighting plant, before expiration of the term of the grant;<sup>9</sup> and, if no limit of time is named in the grant, it is presumed to be perpetual.<sup>10</sup> If the city erect its own electric light plant, it is not bound to pay abutting property owners, on account of the poles erected.<sup>11</sup> Injunction will lie to restrain removal of the poles of an electric light company, or interference therewith, by a subsequently authorized company,<sup>12</sup> or to prevent a borough from cutting down the company's poles,<sup>13</sup> or to prevent a city from cutting down the company's poles, to the injury of a mortgagee of the company's property.<sup>14</sup> The company may be enjoined from erecting its poles on a country highway, in advance of proceedings in condemnation.<sup>15</sup> Electric poles and wires are not an additional use of a country highway, entitling owners of abutting property to damages.<sup>16</sup> An electric light company, without express authority, can not sell out to a street railway company,<sup>17</sup> but it requires no express authority to mortgage its property.<sup>18</sup> A mortgage upon the company's plant, covers its connecting wires and poles.<sup>19</sup>

*Live wire.*—Where a telephone wire, hanging in the street, comes in contact with an electric light current, one injured thereby may hold the city liable.<sup>20</sup>

<sup>7</sup> *Grand Rapids, etc. Co. v. Grand Rapids, etc. Co.* (1888), 33 Fed. Rep. 659.

<sup>8</sup> *Coverdale v. Edwards* (1900), 155 Ind. 374.

<sup>9</sup> *Southwest, etc. Co. v. City of Joplin* (1900), 101 Fed. Rep. 231, (1902) 113 Fed. Rep. 817.

<sup>10</sup> *Suburban, etc. Co. v. Inhabitants, etc.* (N. J. 1890), 41 Atl. Rep. 865.

<sup>11</sup> *Gulf, etc. Co. v. Bowers*, 80 Miss. 570 (1902).

<sup>12</sup> *Consolidated, etc. Co. v. People, etc. Co.* (1892), 94 Ala. 372, 10 South. 440; *Rutland, etc. Co. v. Marble, etc. Co.* (1893), 65 Vt. 377, 20 L. R. A. 821, 36 Am. St. Rep. 868; *Edison, etc. v. Manufacturers, etc. Co.* (Pa. 1901), 49 Atl. Rep. 766, 86 Am. St. Rep. 712.

<sup>13</sup> *Point Pleasant, etc. Co. v.*

*Borough of Bay Head* (1901), 62 N. J. Eq. 296.

<sup>14</sup> *Newton v. Levis* (1897), 79 Fed. Rep. 715.

<sup>15</sup> *Haverford, etc. Co. v. Hart* (1892), 1 Pa. Dist. 571.

<sup>16</sup> *Palmer v. Larchmont, etc. Co.* (1899), 158 N. Y. 231, 43 L. R. A. 672.

<sup>17</sup> *State v. Anderson* (1895), 90 Wis. 550.

<sup>18</sup> *American, etc. Co. v. Gen'l Electric Co.* (N. H. 1901), 51 Atl. Rep. 660.

<sup>19</sup> *Dreisbach v. Ross* (1900), 195 Pa. St. 278.

<sup>20</sup> *Bourget v. Cambridge* (1892), 156 Mass. 391, 16 L. R. A. 605; *Kansas City v. Gilbert* (Kan. 1902), 70 Pac. 350; *Twist v. City of Rochester* (1899), 37 N. Y. App. Div. 307.

**§ 1075. (c) Legislative control.**—Under its power of legislative control, especially of *quasi-public* corporations, the legislature may compel the wires of electric and other companies, to be placed underground,<sup>21</sup> but the company has no right to so place its wires underground, without previous authority.<sup>22</sup> A city may order the wires to be removed altogether, where they are a peril to the public;<sup>23</sup> or order their removal from dangerous proximity to the wires of any other company.<sup>24</sup>

**§ 1076. (d) Taxation.**—The wires, lamps, and poles connected with the generating plant, and the switchboard, and connected wires inside the station of an electric light company, are taxable, as personal property.<sup>25</sup>

**§ 1077. Electric power company.**—Electric power companies utilize flowing water in the generation of electricity, which may be transmitted for long distances, for the company's use, for light, and heat, and power. Unlike waterworks companies, whose use of water requires its diversion from its course, power companies only take its power as the water flows. Where a power company, and a water company, both use the water of the same stream, their conflicting interests often occasion litigation.

**§ 1078. (a) Riparian rights. Use of flowing water for power.** The rights of the power company, as a riparian owner, are governed by the common law of riparian rights; that is, the right to use the water as it passes, without unlawfully diverting it, or disturbing its natural flow. As to what is lawful diversion, the New York Court of Appeals said: "Consumption by watering cattle, temporary detention by dams, in order to run machinery, irrigation, when not out of proportion to the size of the stream, and some other familiar uses, although, in fact, a diversion of the water involving some loss, are not regarded as an unlawful diversion, but are allowed as a necessary incident to the use, in order to effect the highest average benefit to all the riparian owners. As the enjoyment of each must be according to his opportunity, and the upper owner has the first chance, the lower owners must submit to such loss as is caused by reasonable use."

<sup>21</sup> People v. Squire (1892), 145 U. S. 175.

City, etc. Co. (1893), 65 Vt. 377, 20 L. R. A. 821, 36 Am. St. Rep. 868.

<sup>22</sup> State v. Murphy (1895), 130 Mo. 101, 31 L. R. A. 795.

<sup>25</sup> Shelbyville, etc. Co. v. People,

etc. (1892), 140 Ill. 545, 16 L. R. A. 505; Newport, etc. Co. v. Tax Assessors, 19 R. I. 632.

<sup>23</sup> Electric Imp. Co. v. San Francisco (1891), 45 Fed. Rep. 593.

<sup>24</sup> Rutland, etc. Co. v. Marble

Surrounding circumstances, such as the size and velocity of the stream, the usage of the country, the extent of the injury, convenience in doing business, and the indispensable public necessity of cities and villages for drainage, are also taken into consideration, so that a use, which, under certain circumstances,<sup>26</sup> is held reasonable,—under different circumstances, would be held unreasonable. It is also material, sometimes, to ascertain which party first erected his works and began to appropriate the water.<sup>27</sup> Though the damage is only nominal, injunction against diversion of a stream, will lie at the instance of a riparian owner.<sup>27</sup> Where the riparian owner can not use his alleged water power with any benefit, he can not enjoin the use of a dam, and diversion of water for power by an owner above.<sup>28</sup> Where a city, at great expense, and for the public welfare, is diverting water above, and a riparian proprietor below has long delayed asking for an injunction, it will be denied, on condition that the city pay reasonable compensation for the right to take the water.<sup>29</sup> To save prescription against him, a riparian owner below will be allowed nominal damages for unlawful diversion, though no actual damages be shown.<sup>30</sup> Where a waterworks company takes water from a stream, a riparian owner below, may recover damages for all the supply, although he only used a part of it<sup>31</sup> and, although he does not need it, and never used it.<sup>32</sup> No damages will be allowed, where only a very small fraction of the water is taken.<sup>33</sup> It is now common to build storage reservoirs, to hold the flood waters for use by power companies, waterworks, and irrigation companies. This being of advantage to all parties, only nominal damages, if any, are allowed, against the company so taking the water. Where a riparian right has already been acquired, and applied to the rightful uses of a power company or waterworks, it can not be condemned for a like purpose.<sup>34</sup> A city may cut the wires of an electric street railway, which are used in furnish-

<sup>26</sup> Strobel v. Kerr Salt Co. (1900), 164 N. Y. 303, 51 L. R. A.

687, 79 Am. St. Rep. 643.

<sup>27</sup> Amsterdam, etc. Co. v. Dean (1900), 162 N. Y. 278.

<sup>28</sup> Minnesota, etc. Co. v. St. Anthony, etc. Co. (1901), 82 Minn. 505.

<sup>29</sup> New York, City v. Pine (1902), 185 U. S. 93.

<sup>30</sup> New York Rubber Co. v. Roth-

ery (1892), 132 N. Y. 293, 28 Am. St. Rep. 575.

<sup>31</sup> Parry v. Citizens' Waterworks Co. (1891), 50 Hun, 196.

<sup>32</sup> Standen v. New Rochelle W. Co. (1895), 91 Hun, 272, 13 N. Y. S. 471.

<sup>33</sup> Sumner v. City of Gloversville (1895), 35 N. Y. Misc. Rep. 523.

<sup>34</sup> Pocantico Waterworks Co. v. Bird (1891), 130 N. Y. 249.

ing power for private use, if its charter did not expressly authorize it to supply such power.<sup>35</sup> Injunction is the riparian owner's remedy, in case of unlawful diversion, or other interference with the river flow. Injunction will not issue, where the damages are nominal, which are caused by the riparian owner use of the water above, and he offers to pay damages when properly adjudged.<sup>36</sup>

§ 1079. (b) **Condemnation of land for reservoir-site and dam**  
Where, for canal purposes, a city constructed a dam, and acquired by condemnation, all riparian rights affected thereby, a riparian owner may be enjoined from taking water from the dam, and the city may lease its surplus water power.<sup>37</sup> Where part of a railroad's right of way is not necessary for that purpose, and was not so used, a power and irrigation company may condemn the land for its reservoir.<sup>38</sup> In the condemnation of riparian rights, the measure of damages is the difference between the value of the property with the water rights, and what its value would be without them.<sup>39</sup> Inasmuch as the effect of a dam and reservoir for storage of flood-waters, is to increase the flow of the river at dry seasons, only nominal damages will be allowed, in proceeding to condemn riparian rights for the construction of such a dam or reservoir.<sup>40</sup> Though mill-owners, and other riparian owners below the reservoir, are not injured thereby, they are entitled to an injunction; but it will not be enforced until after opportunity be given to condemn riparian rights for its construction.<sup>41</sup>

<sup>35</sup>Electric Power Co. v. Metropolitan, etc. Co. (1894), 75 Hun, 68.

<sup>36</sup>New Haven, etc. Co. v. Borough of Wallingford (1899), 72 Conn. 293, 44 Atl. 235.

<sup>37</sup>Kaukauna W. P. Co. v. Green Bay, etc. (1891), 142 U. S. 254.

<sup>38</sup>Denver, etc. Co. v. Denver, etc. R. R. (Colo. 1902), 69 Pac. Rep. 568.

<sup>39</sup>City of Syracuse v. Stacey (1899), 45 N. Y. App. Div. 249; Gallagher v. Kingston W. Co. (1898), 25 N. Y. App. Div. 82.

<sup>40</sup>Matter of Thompson (1895), 85 Hun, 438.

<sup>41</sup>Lehigh Coal, etc. Co. v. Scranton, etc. Co. (1891), 6 Pa. Dist. Rep. 291.

(1899), 45 N. Y. App. Div. 249.

## CHAPTER XLIV.

### TELEGRAPH AND TELEPHONE COMPANIES.

§ 1080. Telegraph and telephone companies.	§ 1092. (h) Liability to owners of abutting property.
1081. (a) Are public corporations. Legislative control.	1093. (i) Furnishing market quotations to "bucket-shop."
082. (b) Power to acquire right of way.	1094. (k) Wires underground. Subways.
1083. (c) Are not strictly common carriers.	1095. (l) Submarine telegraph cable. "Navigable mud."
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1089. (e) Liabilities. Libelous message. Sagging wires.	1101. (b) <i>Mandamus</i> to put phone in residence.
1090. (f) Injuries to shade trees. Measure of damages.	1102. (c) Its property taxable as personality.
1091. (g) Liability for accidents from crossed wires, etc.	

#### References:

Electric corporations. Sections 1066-1071.  
Electric light and power companies. Sections 1072-1079.  
Electric street railways. Sections 1066-1071.  
Railroads and other *quasi*-public corporations. Sections 1032-1065.  
Legislative control. Sections 922-932.

§ 1080. Telegraph and telephone companies.—The word "telegraph," in statutes, embraces "telephone," whether or not the statute expressly so provides.<sup>1</sup>

<sup>1</sup> Franklin v. North Western T. Co., 69 Iowa, 97; Richmond v. Southern B. T. Co., 42 U. S. App. 686, 28 U. S. C. C. A. 659; Cincinnati, etc. v. City, etc. Assn., 48 Ohio, 390; Cumberland, etc. Co. v. U. S. Electric Co., 42 Fed. 273, 12 L. R. A. 544.

§ 1081. (a) Telegraph and telephone companies are public corporations. Legislative control.—The regulations of road-commissioners, adopted upon the construction of a telegraph, along the highway, such as they deemed expedient, did not exhaust the power to prevent their making and enforcing new regulations, as increased traffic, and new conditions, demanded.<sup>2</sup> Their business so intimately concerns the public, that the government, on this account, exercises over them its right of legislative control, to insure impartiality in their service, and to prevent the exactation of unreasonable rates and charges. In return, it grants to them special privileges, such as the right of eminent domain. A city ordinance, prohibiting any telegraph company from furnishing any owner, or agent, of a poolroom in the city, any message concerning a horse-race, is not unauthorized interference with the legitimate business of a telegraph company,<sup>3</sup> or unconstitutional regulation of interstate commerce, though the telegram come from another State.<sup>4</sup> Telegraph and telephone companies are subjected to governmental control, upon the same principles as railway carriers.<sup>5</sup> A telegraph company can not, by contract, evade a penal statutory liability for failure to transmit a message correctly.<sup>6</sup> Where a company has power to own and operate telephone lines, to erect poles along and across public roads and streets, and condemn private property for a right of way,—it is charged with the duty of receiving and transmitting messages with impartiality and good faith, and is subject to public regulations, including the right of the State to fix and prescribe a maximum rate for telephone service. Power to regulate may be delegated to municipal corporations.<sup>7</sup> These companies may not arbit-

<sup>2</sup> American, etc. T. Co. v. Harbor Creek, etc., 23 Pa. Super. Ct. 437.

<sup>3</sup> City of Louisville v. Wehmhoff (Ky. 1903), 76 S. W. 876, 25 Ky. Law Rep. 995.

<sup>4</sup> *Idem* (Ky. 1904), 79 S. W. 201.

<sup>5</sup> Western Union Tel. Co. v. Arams, 87 Ind. 598, 44 Am. Rep. 776; Western Union Tel. Co. v. Buchanan, 35 Ind. 429, 9 Am. Rep. 744; Western Union Tel. Co. v. Meek, 49 Ind. 53. Texas Rev. Stat., art. 624, declares that no corporation shall contract with a land-owner for the exclusive right to maintain a telegraph line on

his line, and it was held that the prohibition applies to such an agreement between a railroad company and a telegraph company. Western Union Telegraph Co. v. Baltimore & Ohio Telegraph Co., 22 Fed. Rep. 133.

<sup>6</sup> City of St. Louis v. Bell Telephone Co. (1888), 96 Mo. 623, 9 Am. St. Rep. 370, notwithstanding a clause in the incorporating act conferring upon the company power "to establish reasonable charges."

<sup>7</sup> State v. Nebraska Telephone Co., 17 Neb. 126, 52 Am. Rep. 404. Ind. Act. of April 8, 1885, §§ 2, 3,

trarily refuse their facilities to any person desiring them and offering to comply with their regulations; and *mandamus* will issue to compel them to do their duty.<sup>8</sup> The municipality has no power unless it is expressly conferred by the legislature, to authorize construction of a telegraph line within its limits,<sup>9</sup> or to regulate its rates.<sup>10</sup> Authority conferred by a State upon a municipality, to regulate the construction of a telegraph line, authorizes regulation only as to public safety and convenience, but gives no authority to

provides that every telephone company with wires wholly or partly within the state, and engaged in a general telephone business, shall supply all applicants with telephone connections and facilities, without discrimination, and fixes a maximum rental. And it was held that a telephone company, doing a general business, must furnish any person within the local limits of its business, in any town or city, with a telephone and connections for his own use, and that it was no defense to say that the company did not rent telephones, but furnished such service by means of public stations only. Central Union Tel. Co. v. State (Ind. 1890), 24 N. E. Rep. 215, following Central Union Tel. Co. v. State (Ind. 1889), 19 N. E. Rep. 604. The defendant, a Connecticut telephone company, had purchased from a Massachusetts telephone company, owning the patent, the right to use its magnetic telephone system for a certain period, on the condition that it should not permit telegraph companies to use the system unless they had purchased the right from the Massachusetts company. A statute of Connecticut provides that every telephone company shall impartially permit persons and corporations to transmit speech through its wires by its instruments. The plaintiff, a telegraph company in Connecticut, not having purchased the right, sued to compel the defendant to permit it to use the system; and

it was held not maintainable. American Rapid Telegraph Co. v. Connecticut Telephone Co., 49 Conn. 352, 44 Am. Rep. 237.

<sup>8</sup> See, generally, notes and articles by Adelbert Hamilton, 24 Am. L. Reg. N. S. 573; by W. W. Thornton, 25 Am. L. Reg. 317, and in 23 Cent. L. J. 34; 10 Cent. L. J. 438; 59 Am. Rep. 172, 175; 44 Am. Rep. 241, 243; 38 Am. Rep. 587, 589. A telephone company is a common carrier, whose charges may be regulated by the legislature, and which may be required to furnish equal facilities to all. And it cannot evade a statute limiting its charges, by failing to furnish the organized apparatus or combination of instruments commonly used. Central Union Tel. Co. v. Bradbury, 106 Ind. 1. Under Ind. Rev. Stat. 1881, § 4176, imposing a penalty on telegraph companies for failure to properly transmit messages "during the usual office hours," it was held that where a message was received in office hours and promptly transmitted to another office, where it was received after office hours, and so not delivered till noon of the next day, the company was not liable if the office hours at the last office were reasonable. Western Union Tel. Co. v. Harding, 103 Ind. 505.

<sup>9</sup> State v. Newark (1892), 54 N. J. L. 102.

<sup>10</sup> St. Louis v. Bell T. Co., 96 Mo. 623, (1888), 2 L. R. A. 278, 9 Am. St. Rep. 270.

prohibit construction, or to impose burdensome conditions or exactions upon the telegraph company.<sup>11</sup> A city can only regulate construction and operation. It can not prevent either.<sup>12</sup> It can not adjudicate the right of the company to construct or maintain its line, and order removal of its poles or wires, without its opportunity to be heard.<sup>13</sup> A telegraph line, constructed without statutory authority, may be indicted as a public nuisance.<sup>14</sup>

**§ 1082. (b) Power to acquire right-of-way.**—One quasi-public corporation may condemn the land of another, not necessary for performance of the latter's duties.<sup>15</sup> The States generally provide by statute, for proceedings by telegraph companies, to condemn right of way on public roads, and private property. The condemnation of the right to establish a telegraph line, does not involve the taking of private property for exclusive use of the company, and therein differs from ordinary exercise of the right of eminent domain. The damages allowed are therefore nominal, except where actual damages are shown.<sup>16</sup> A contract between a telegraph company and a railroad company for the joint construction and use of a telegraph line along the railroad, though not limited in time, may, nevertheless, be terminated by either company on reasonable notice to the other.<sup>17</sup> Where each, of two companies, is claiming the right to locate, upon the same line, that company is prior in right, which first, by corporate action, adopts the route and files its map thereof.<sup>18</sup> A contract by a railroad, giving to a telegraph company exclusive right to establish its telegraph line upon the railroad right of way, is void, as to the exclusive part, being contrary to public policy, and contrary to the Post Road Act of Congress.<sup>19</sup> A railroad may establish and operate a telegraph line upon its right of way for its railroad business.<sup>20</sup> Under statutory authority, a telegraph company may condemn right-of-

<sup>11</sup> *Inhabitants, etc. Co. v. N. Y., etc. T. Co.* (1898), 57 N. J. Eq. 123.

<sup>16</sup> *Nicoll v. New York, etc. Co.* (1898), 62 N. J. L. 156.

<sup>12</sup> *Mich., etc. Co. v. City of Benton* (1899), 121 Mich. 512, 47 L. R. A. 104.

<sup>17</sup> *Western Union T. Co. v. Pennsylvania Co.* (1903), 125 Fed. 67.

<sup>13</sup> *Delaware, etc. Co. v. Committee, etc.* (N. J. 1901), 50 Atl. Rep. 452.

<sup>18</sup> *Utah, etc. R. R. v. Utah, etc. Ry.* (1901), 110 Fed. Rep. 879.

<sup>14</sup> *Commonwealth v. Boston*, 97 Mass. 555 (1867).

<sup>19</sup> *Pacific, etc. Co. v. Western U., etc. Co.* (1892), 50 Fed. Rep. 493; *United States v. Union Pac. Ry.* (1895), 160 U. S. 1.

<sup>15</sup> *State v. American, etc. Co.*, 43 N. J. L. 381 (1881).

<sup>20</sup> *United States v. Western U. T. Co.* (1892), 50 Fed. Rep. 28.

way for its line, on a railroad right-of-way, upon the payment of only nominal damages, inasmuch as the railroad owns only a right-of-way, and such right-of-way is not damaged or interfered with by the telegraph company.<sup>21</sup> A statute authorizing construction of telegraph lines upon "public roads," does not authorize construction over a railroad right-of-way.<sup>22</sup> Where a telegraph company is authorized, generally, to condemn its right-of-way, and has accepted the provision of the federal Post Road Act, it may condemn right-of-way for its line, upon a railroad right-of-way, independent of express authority.<sup>23</sup> In the absence of express authority therefor, a telegraph company can not condemn right-of-way upon the right-of-way of a railroad, where that company needs to use it all.<sup>24</sup> Though for awhile contested it is now the consensus of decision and a telegraph corporation under express authority of statute may condemn right-of-way for its line,<sup>25</sup> and operate it, upon the right-of-way of a railroad,<sup>26</sup> and that abutting property owners are not entitled to damage on account of such occupation by the telegraph company.<sup>27</sup> But a statute authorizing construction of telegraph lines upon "public roads," does not authorize construction over a railroad right-of-way.<sup>28</sup> The telegraph company can not enjoin any new or competing line from erecting its lines on the railroad right-of-way.<sup>29</sup> Where a railroad company carries and distributes material along its right-of-way, to one telegraph company, it can not refuse to do so for another, though competing line.<sup>30</sup> Where it has not accepted the provisions of the Post Road Act, a telegraph company can not condemn its right to stretch its wires upon an interstate bridge over navigable waters.<sup>31</sup> A telegraph

<sup>21</sup> Mobile, etc. R. R. v. Postal, etc. Co. (1898), 120 Ala. 21, 24 So. 408; Postal, etc. Co. v. Oregon, etc. Co. (1900), 104 Fed. Rep. 623; St. Louis, etc. R. R. v. Southwest, etc. Tel. Co. (1903), 121 Fed. Rep. 276; Atlantic, etc. Tel. Co. v. Chicago, etc. R. R. Co. (1874), 2 Fed. Cas. 176; 6 Biss. 158.

<sup>22</sup> Western U. T. Co. v. Penn. R. R. (1903), 120 Fed. Rep. 362.

<sup>23</sup> Postal Tel., etc. Co. v. Chicago, etc. Ry. (Ind. 1903), 66 N. E. Rep. 919.

<sup>24</sup> Western U. T. Co. v. Penn. R. R. (1903), 120 Fed. Rep. 332.

<sup>25</sup> South Carolina, etc. R. R. Co. v. American, etc. R. R. Co. (1903), 43 S. E. 970.

<sup>26</sup> Prather v. Western U. T. Co. (1883), 89 Ind. 501.

<sup>27</sup> Western U. T. Co. v. Rich, 19 Kan. 517 (1878), 27 Am. Rep. 159.

<sup>28</sup> Western U. T. Co. v. Penn. R. R. (1903), 120 Fed. Rep. 362.

<sup>29</sup> Western U. T. Co. v. American U. T. Co. (1879), 9 Biss. 72.

<sup>30</sup> Cumberland, etc. Co. v. Morgan's, etc. R. R. (1899), 51 La. Ann. 29, 72 Am. St. Rep. 442.

<sup>31</sup> Chicago, etc. Co. v. Pacific, etc. Co. (1887), 36 Kan. 113.

company can not condemn its right-of-way over a draw-bridge, where its operation would be interfered with by the telegraph line.<sup>33</sup> An Indian tribe has no power to grant a monopoly to a telephone company within its territory.<sup>34</sup> A contract between a railroad and a telegraph corporation, granting to the latter exclusive privilege, to operate its telegraph lines along the railroad right-of-way, though irrevocable by the railroad company, and valid as a contract, at the time, was invalidated by the Post Road Act of Congress of 1866, so far as the contract affected the telegraph company's right to construct its line along any post road, as conferred by that act.<sup>35</sup> A telegraph company, authorized to use the streets of a city for location of its poles and wires, can not assert an exclusive right thereto, as against another telephone company which is granted like privileges by the city authorities.<sup>36</sup> A general statute, authorizing telegraph companies to construct lines along any of the public roads, applies as well to foreign corporations, that comply with requirements for doing business in the State.<sup>37</sup>

**§ 1083. (c) Telegraph and telephone companies are not strictly common carriers.**—A telephone or telegraph corporation is not a common carrier, or liable as such, as insurer of the delivery of the messages transmitted.<sup>38</sup> Their methods of transmission of intelligence, so far differ from the methods of transportation of common carriers, that they are held to be not common carriers, in the strictest sense, and, though not liable as such, they are engaged in a public employment for hire, and must exercise skill and diligence, adequate to the obligations they assume.<sup>39</sup> Owing to natural atmospheric disturbances, over which they can have no control, they are not insurers for the safe and accurate transmission of messages, under all circumstances, but they must exercise a high degree of care, skill and diligence.<sup>40</sup>

<sup>33</sup> Pacific, etc. Co. v. Chicago, etc. Co. (1887), 36 Kan. 118.

<sup>34</sup> Muskogee, etc. Co. v. Hall, 118 Fed. 382 (1902).

<sup>35</sup> Western U. T. Co. v. Pennsylvania Co. (U. S. C. C. A., Pa. 1904), 129 Fed. 849.

<sup>36</sup> American, etc. Co. v. Morgan, etc. (Ala. 1903), 36 So. 178.

<sup>37</sup> State v. City, etc. (Mont. 1904), 76 Pac. 758.

<sup>38</sup> Primrose v. Western U. T. Co.

(1894), 154 U. S. 1, *per contra*, in South Carolina; Gwynn v. Citizens, etc. Co. (1904), 48 S. E. 460, 69 S. C. 434.

<sup>39</sup> Wolfskehl v. Western U. T. Co., 46 Hun (N. Y.), 542; Western U. T. Co. v. Short, 53 Ark. 434; Tyler v. Western U. T. Co., 60 Ill. 491; Fowler v. Western U. T. Co., 80 Me. 381.

<sup>40</sup> Chapman v. Western U. T. Co., 90 Ky. 265.

**§ 1084. Telegraph. Definition.**—Telegraph is defined, broadly, as any apparatus, whereby intelligible messages are transmitted to a distance, by signals, by compressed air in tubes, by a heliograph, or by any other system of signaling. In ordinary use, it is a wire or wires and connecting apparatus, used for transmitting messages by means of electricity.<sup>41</sup>

**§ 1085. (a) Rights, powers and duties of telegraph companies.**  
**Injunction, etc.**—A telegraph line is ordinarily real estate, but a contrary intention, at the time of construction, will govern, as, where a telegraph company, in constructing its line upon a railroad right-of-way, agreed that it should be free to remove its line, upon termination of the contract.<sup>42</sup> A telegraph company may adopt and follow its rule, to stop service while bills are unpaid.<sup>43</sup> A telegraph company is a *quasi* corporation, and obliged to serve all alike who apply, and tender the authorized rates of charge. A telegram, sent by a telegraph company, is not a privileged communication, to the extent that the company may refuse to produce it in court.<sup>44</sup> Without express authority, a telegraph company can not sell its line,<sup>45</sup> nor consolidate with another telegraph company,<sup>46</sup> nor lease its line.<sup>47</sup> "It was held, both by Mr. Justice Brewer, . . . and by Mr. Justice Miller, and Judge McCrary, in other cases, where the same question was involved, that the obligation thus imposed on the several railroad companies, to construct and maintain telegraph lines, could not be lawfully avoided, by leasing their lines of telegraph, after their construction, to some other corporation, to be by it maintained and operated."<sup>48</sup> Where statutory power was conferred upon corporations to purchase any privilege or franchise, which is in direct aid of the business for which the corporation, acquiring the same, was organized, a Wisconsin telephone company was authorized to purchase and own the franchises, and property of another telephone company in the same locality.<sup>49</sup> Power in the charter, to establish, maintain and operate a telephone, and to hold and convey real estate proper for the purpose, does not authorize the sale

<sup>41</sup> Joyce on Electric Law, § 2.

<sup>46</sup> United States v. Union Pac.

<sup>42</sup> Paul, etc. Ry. v. Western, etc. Co. (1902), 118 Fed. Rep. 497.

<sup>47</sup> Ry. (1895), 160 U. S. 1.

<sup>43</sup> Rushville, etc. Co. v. Irvin, 27 Ind. App. 62 (1901).

<sup>48</sup> Ry. (1895), 160 U. S. 1.

<sup>44</sup> Re Storror (1894), 63 Fed. Rep. 564.

<sup>49</sup> Union Pac. Ry. v. United States (1890), 59 Fed. Rep. 813.

<sup>45</sup> United States v. Western U. T. Co. (1892), 50 Fed. Rep. 28.

<sup>49</sup> Badger T. Co. v. Wolf River T. Co. (Wis. 1903), 97 N. W. 907.

of all the company's property and franchises. Such a sale is contrary to public policy, and void.<sup>50</sup> A telephone company can acquire no right to use the streets, alleys, or public grounds of a city or town, for its poles or wires, without its consent first obtained.<sup>51</sup> A statute, giving telegraph and telephone companies right-of-way along public roads, does not authorize use of the streets of a municipality for that purpose. Such use, without authority, is a public nuisance.<sup>52</sup>

§ 1086. (b) Printed rules and regulations. It cannot contract against its own liability.—A rule of a telephone company, requiring all unpaid dues to be paid on, or before, a certain day each month, upon pain of refusal to continue service pending the delinquency, is a reasonable regulation which the company is entitled to enforce.<sup>53</sup> The main question as to printed rules and regulations of telegraph companies, is whether or not the rule in question, is reasonable. Where the rules require prepayment of messages, if the agent accepts the message, without prepayment, it is no excuse for not sending the message, where the rule is unknown to the sender. So far as negligence of the company in delivery is concerned, its rule limiting its liability for unrepeated messages, is void. A common carrier can not stipulate to relieve himself from liability caused by the negligence of himself or his servants.<sup>54</sup> "There are some things which can not be accomplished, even by artificially worded 'fine-print' conditions on the back of a telegraph blank."<sup>55</sup> Such contracts form no part of the contract, where the sender does not assent thereto, or know of the conditions.<sup>56</sup> Against its liability for non-delivery of a message for which it was paid, and which it contracted to deliver, it can not defend, on the ground that the message related to "futures" (gaming contracts), and was therefore illegal. No mat-

<sup>50</sup> Cumberland, etc. Co. v. City of Evansville (U. S. C. C. A.), 127 Fed. 187 (Ind. 1903).

<sup>51</sup> East Tenn., etc. Co. v. Anderson, etc. Co. (1904), 74 S. W. 218, 24 Ky. Law, 2358.

<sup>52</sup> Neb. T. Co. v. Western, etc. Co. (Neb. 1903), 95 N. W. 18.

<sup>53</sup> Irvin v. Rushville Co-operative T. Co. (Ind. 1903), 69 N. E. 258.

<sup>54</sup> Western U. T. Co. v. Tyler, 74 Ill. 168, 24 Am. Rep. 279; American U. T. Co. v. Daugherty, 89 Ala.

191; Western U. T. Co. v. Short, 53 Ark. 434; Reddington v. Pacific P. Co., 107 Cal. 317; Western U. T. Co. v. Graham, 1 Colo. 230; Merchants' Dispatch, etc. Co. v. Cornforth, 3 Colo. 280, 25 Am. Rep. 757; Western U. T. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480.

<sup>55</sup> Francis v. Western U. T. Co., 58 Minn. 252.

<sup>56</sup> North Packing, etc. Co. v. Western U. T. Co., 70 Ill. App. 275; Western U. T. Co. v. Lyean, 60 Ill. App. 124.

ter how reluctant the company became, to transmit such a message, if its reluctance arose after accepting payment for sending it, the company has no option, but to perform the service, or pay the penalty for its non-performance.<sup>57</sup>

**§ 1087. (c) Taxation. License fees.**—It is in violation of the federal constitution, for any State to tax interstate telegraphic messages. Such communication is interstate commerce,<sup>58</sup> but a State may tax so much of the entire system of an interstate telegraph company, as proportionally is within the State.<sup>59</sup> Unless expressly authorized by the legislature to levy a license tax, a city has no power to do so.<sup>60</sup> A reasonable license fee charged by the State upon local business of a telegraph company, done exclusively within the State, is constitutional.<sup>61</sup> A city, under authority from the State, may charge an interstate telegraph company a reasonable rental for use of the streets, but an unreasonable license tax is an interference with interstate commerce, and void.<sup>62</sup> The contract of a telegraph company, to serve one telegraph company to the exclusion of others, is void.<sup>63</sup> For discrimination in rates, as between two newspapers, the defendant was held liable in damages.<sup>64</sup> An ordinance, imposing license fees by a municipality, upon the poles, or wires of an interstate telegraph company, where no expense has been incurred by inspection, is illegal, and void, because based upon an unreasonable exercise of the police power.<sup>65</sup>

**§ 1088. (d) Post-road act of Congress. Interstate commerce.** The Post-Road Act of Congress of July 24, 1866, authorizing construction of telegraph lines over post-roads, only operated to confer on telegraph companies, the rights of the federal government,

<sup>57</sup> *Gray v. Western U. T. Co.*, 87 Ga. 350, 27 Am. St. Rep. 259.

<sup>58</sup> *Western U. T. Co. v. Alabama* (1889), 132 U. S. 472; *San Francisco v. Western U. T. Co.* (1892), 96 Cal. 140; *Western U. T. Co. v. Pendleton* (1887), 122 U. S. 347; *Western U. T. Co. v. Massachusetts* (1888), 125 U. S. 530.

<sup>59</sup> *Postal T. Cable Co. v. Adams* (1895), 155 U. S. 688; *State v. Western U. T. Co.* (1901), 165 Mo. 502.

<sup>60</sup> *Wisconsin Tel. Co. v. Oshkosh* (1884), 62 Wis. 32.

<sup>61</sup> *Postal Tel. C. Co. v. Charles-ton* (1894), 153 U. S. 692; West-

ern U. T. Co. v. Borough of New Hope (1903), 187 U. S. 419; *Clark v. Titusville* (1902), 184 U. S. 329.

<sup>62</sup> *St. Louis v. Western, etc. Tel. Co.* (1894), 63 Fed. Rep. 68; *Philadelphia v. W. U. T. Co.* (1889), 40 Fed. Rep. 615.

<sup>63</sup> *Delaware, etc. T. Co. v. State* (1892), 50 Fed. 677; *Chesapeake, etc. T. Co. v. Baltimore, etc. T. Co.* (1887), 66 Md. 399.

<sup>64</sup> *Western U. T. Co. v. Call Pub. Co.* (1895), 44 Neb. 326, 27 L. R. A. 622, 48 Am. St. Rep. 729.

<sup>65</sup> *Postal T. Co. v. Borough of New Hope*, 192 U. S. 55.

and did not authorize them to use streets and alleys of municipalities, except upon the conditions prescribed in the act.<sup>66</sup> A bill filed, to compel a telegraph company to remove its poles and wires, from the streets it had occupied for twenty-one years without objection, was held to be properly dismissed for laches.<sup>67</sup> Under an ordinance, granting franchise to a telegraph company, providing it shall not increase its rates for service, the company must furnish the service to any applicant, with all the improvements it has in use.<sup>68</sup> The federal court held, under the Post-Road Act, amendment of 1888, that:—"That act, in effect, in connection with earlier statutes, made the right-of-way of every railroad a post-road, and provided that any telegraph company, on complying with the provisions of the act, should be entitled to construct and operate a line of telegraph upon all post-roads. The right thus created is for the benefit of the telegraph company."<sup>69</sup> The Post-Road Act did not give telegraph companies the right to use public or private ways, or property, without payment of damages.<sup>70</sup> Under that act, interstate telegraph business is interstate commerce, and can not be excluded by a State statute,<sup>71</sup> but the company is liable to pay taxes lawfully imposed,<sup>72</sup> and must comply with reasonable regulations of a city.<sup>73</sup>

**§ 1089. (e) Liabilities. Libelous messages. Sagging wires.** Neither substantial nor exemplary damages will be allowed for non-delivery of social telegrams.<sup>74</sup> For failure by a telegraph company to transmit a cipher message, wholly unintelligible to its agent who was not informed of its nature or importance, it is not liable for damages, beyond amount of the fee for transmission.<sup>75</sup> Statutory liability in damages for negligence of a telegraph company in transmission of messages, is construed to extend to damages only from proximate results of its negligence.<sup>76</sup> Under constitutional declaration that telegraph companies are liable as

<sup>66</sup> Postal Tel. C. Co. v. City of Newport, 76 S. W. 159, 25 Ky. Law R. 635, Rev. St. U. S., §§ 5263-5269.

<sup>67</sup> City of Bradford v. New York, etc. Co. (1903), 206 Pa. 582.

<sup>68</sup> Chicago T. Co. v. Illinois, etc. Assn. (1903), 106 Ill. App. 54.

<sup>69</sup> United States v. Northern Pac. R. R. (1903), 120 Fed. Rep. 546.

<sup>70</sup> Richmond v. Southern, etc. Co. (1899), 174 U. S. 761.

<sup>71</sup> Pensacola Tel. Co. v. Western Union, etc. (1877), 96 U. S. 1.

<sup>72</sup> St. Louis v. Western U. T. Co. (1893), 148 U. S. 92.

<sup>73</sup> City of Toledo v. Western U. T. Co. (1901), 107 Fed. 10.

<sup>74</sup> Western U. T. Co. v. Cross, Adm'r (1903), 25 Ky. Law R. 646, 76 S. W. 162.

<sup>75</sup> Western U. T. Co. v. Mellor, etc. (Tex. 1903), 76 S. W. 449.

<sup>76</sup> Fisher v. Western U. T. Co. (Wis. 1903), 96 N. W. 545.

common carriers, they are liable for negligence by erroneous transmission of a message, notwithstanding any stipulation against liability, for cipher or unrepeated messages.<sup>77</sup> A telegraph company, unwilling to deliver a message beyond free-delivery limits, without prepayment or guaranty, is guilty of negligence in not wiring to the sender a demand for compliance with the rule.<sup>78</sup> A telegraph company may not depend solely upon the address of a telegram, but must exercise the care and diligence required by law, in seeking definite information.<sup>79</sup> After termination of its lease, a telegraph company has no contractual right to continue to occupy, with its lines and poles, a railroad right-of-way, after timely notice to remove them, as provided in the lease.<sup>80</sup> Negligence, by the defendant telegraph company, is sufficiently alleged in stating that the company received a second message revoking the first which it had carelessly neglected to send at once, and delivered the last message first, the first message thereby revoking the last.<sup>81</sup> Where a traveler is injured by contact with a sagging wire, or broken wire, upon or near the surface of the street, its presence there presumes negligence by the electric company and the burden of proof is upon it to overcome that presumption.<sup>82</sup> Where a telegraph company under contract to gather and telegraph news dispatches to a newspaper, wired in error that a named business firm had failed with heavy liabilities, and the telegram was published as also a later telegram correcting the former, the telegraph company was held responsible for the publication of the libel.<sup>83</sup> Where a station agent of a telegraph company, acting within the scope of his employment, maliciously transmits a libelous message over the company's wires to another of its station agents, for delivery, and which was delivered to a third person, the telegraph company was held liable in exemplary damages.<sup>84</sup> The telegraph company was held liable for non-delivery of a message, where the addressee's name was spelled Hulbert instead of Hurlburt, where the company did not use

<sup>77</sup> Postal T. Co., etc. v. Wells, 35 So. 190 (Miss. 1903).

<sup>78</sup> Bryan v. Western U. T. Co. (N. C. 1903), 45 S. E. 938.

<sup>79</sup> Western U. T. Co. v. Bowen (Tex. 1903), 76 S. W. 613.

<sup>80</sup> Western U. T. Co. v. Pennsylvania R. Co. (1903), 123 Fed. 33.

<sup>81</sup> Hocker v. Western U. T. Co. (Fla. 1903), 34 So. 901.

<sup>82</sup> O'Flaherty v. Nassau, etc. Co., 34 N. Y. App. Div. 74; City of Denver v. Sherrett, 60 U. S. App. 104, 88 Fed. 226.

<sup>83</sup> Dominion Tel. Co. v. Silver, 10 Can. S. C. 238.

<sup>84</sup> Peterson v. Western U. T. Co., 72 Minn. 41.

reasonable efforts to deliver it.<sup>85</sup> The telegraph company was not liable for negligence by reason of delay in the delivery of a message addressed to sender's wife at a certain street-number in Dallas, where the company failed to send the message to plaintiff's residence in West Dallas.<sup>86</sup> Where the resulting injury was mental suffering, recovery may be had for negligence in the transmission of a telegram.<sup>87</sup> Where by mistake of the telegraph operator, through no fault of the sender, the cost of machinery was much greater than that stated in the telegram from the manufacturer, which formed the basis of the contract of purchase, the telegraph company was held liable to the receiver of the telegram, and who made the contract, for the full amount of his loss.<sup>88</sup> Damages for mental anguish suffered by non-delivery of a death message, owing to negligence of the telegraph company, not being ground for damages under the laws of Arkansas,—where the message was given for transmission to the addressee in Texas,—he could not recover in a suit in Texas against the telegraph company.<sup>89</sup>

**§ 1090. (f) Injuries to shade-trees. Measure of damage.—** Shade-trees standing inside the curbing and not obstructing travel, are not a nuisance, and are not liable to removal as such.<sup>90</sup> A telegraph company may cut away or trim the limbs of trees, to the extent that is unavoidably necessary, where they obstruct or endanger the line, as located by authority.<sup>91</sup>

**Measure of damages.—**Where the company is held liable in damages to abutting property-owners for cutting shade-trees, the measure of damages, is the difference in value of the property, before the cutting, and its value afterward.<sup>92</sup> By statute in New

<sup>85</sup> Hurlburt v. Western U. T. Co. (Iowa, 1904), 98 N. W. 794.

<sup>86</sup> Western U. T. Co. v. Christensen (Tex. Civ. App. 1904), 78 S. W. 744.

<sup>87</sup> Cowan v. Western U. T. Co. (Iowa, 1904), 98 N. W. 281; Hurlburt v. Western U. T. Co. (Iowa, 1904), 98 N. W. 794; Western U. T. Co. v. Swearingen (Tex. 1904), 78 S. W. 491; Western U. T. Co. v. Anderson (Tex. Civ. App. 1903), 78 S. W. 34.

<sup>88</sup> Wolf Co. v. Western U. T. Co. (Pa. 1904), 24 Pa. Super. Ct. 129.

<sup>89</sup> Western U. T. Co. v. Buchanan

(Tex. Civ. App. 1904), 80 S. W. 561.

<sup>90</sup> Dillon, Mun. Corp., §§ 663 and 339.

<sup>91</sup> Southern Bell. T. Co. v. Constantine (1894), 61 Fed. Rep. 61; Van Siclen v. Jamaica, etc. Co., 45 N. Y. App. Div. 1 (1899); Wyant v. Central, etc. Co. (1900), 123 Mich. 51, 47 L. R. A. 497.

<sup>92</sup> Edsall v. Howell (1895), 86 Hun, 424; Bronson v. Albion T. Co. (Neb. 1903), 93 N. W. Rep. 201; Clay v. Postal T. Co. (1892), 70 Miss. 406, 11 So. 658.

York, three times the amount of the verdict is allowed in damages for cutting shade-trees, unless the injury was casual or involuntary.<sup>93</sup> The measure of damages for unreasonable cutting of trees by a telephone company, is the difference between the value of the land as it would have been if the cutting had been reasonable, and its value after the cutting, and not the difference between the values before and after the cutting.<sup>94</sup>

**§ 1091. (g) Liability for accidents from crossed wires, etc.—** Unless by statute it is made liable, a municipality is not liable for injuries due to defects in constructing or maintaining a telegraph line, except for neglect after due notice of the danger.<sup>95</sup> Where a telegraph pole is erected unlawfully, or in a place where it is dangerous, the company is liable for injury to anyone running against it, or otherwise injured by it.<sup>96</sup> Where injury results from an accident caused by the poles or wires of a telegraph line, the question is whether the injury was imputable to the company's negligence, and is one for a jury to decide from the proofs of the circumstances of the case, as also in cases where the employes of one company are injured by a current from the wires of another company.<sup>97</sup> A telegraph company was held liable for burning of a building, caused by its wires carrying an electric current, setting fire to the building.<sup>98</sup> Where death or other injury is caused by electric current from crossed telegraph and trolley wires, the prevailing opinion is that liability is limited to the company from whose negligence the wires met.<sup>99</sup> Employes of the telegraph company take the risk of the business, and they can not hold the company liable for negligence of their fellow-servants. A superintendent in charge of employes is a fellow-

<sup>93</sup> *Humes v. Proctor* (1893), 73 Hun, 265.

<sup>94</sup> *Meyer v. Standard T. Co.*, 98 N. W. 300 (Iowa, 1904).

<sup>95</sup> *Mayor, etc. v. House* (1900), 104 Tenn. 1, 55 S. W. 153; *Graham v. Boston* (1892), 156 Mass. 75.

<sup>96</sup> *Sheffield v. Central Union T. Co.* (1888), 36 Fed. Rep. 164; *Cleveland v. Bangor, etc. St. R. R.* (1894), 86 Me. 232.

<sup>97</sup> *Wagner v. Brooklyn, etc. R. R.* (1902), 69 N. Y. App. Div. 349; *Quell v. Empire, etc. Co.* (1895), 92 Hun, 539, 159 N. Y. 1; *Ark. Tel. Co. v. Ratteree* (1892), 57 Ark.

429, 21 S. W. 1059; *Devine v. Brooklyn, etc. Co.* (1896), 1 N. Y. App. Div. 237; *Danville v. Watkins* (1900), 97 Va. 713, 34 S. E. 884; *Wales v. Pacific, etc. Co.*, 130 Cal. 521 (1900); *Citizens' etc. R. R. v. Batley* (Ind. 1902), 65 N. E. Rep. 2; *Leeds v. New York, etc. Co.* (1901), 64 N. Y. App. Div. 484.

<sup>98</sup> *Miles v. Postal, etc. Co.*, 55 S. C. 403 (1899), 33 S. E. 493.

<sup>99</sup> *Rowe v. New York, etc. Co.* (1901), 66 N. J. L. 19; *Western U. T. Co. v. Nelson* (1896), 82 Md. 293, 31 L. R. A. 572; *Neel v. Wilmington, etc. Ry.* (Del. 1902), 53 Atl. Rep. 338.

servant.<sup>1</sup> Exemplary damages are not recoverable against a telegraph company for an injury due to its negligence, unless it was wilful.<sup>2</sup> A telegraph company may enjoin an electric light company from stringing its wires so closely to those of the former company as to interfere with working them effectively or safely.<sup>3</sup> Where the wires of a telegraph company are on the same poles with those of an electric light company, the latter must insulate its wires for protection of the employes of the telegraph company.<sup>4</sup> For damage done to the wires and property of a duly authorized telephone company in a city by a person licensed to move houses, caused in course of such removal, he is liable to the company.<sup>5</sup>

**§ 1092. (h) Liability to owners of abutting property.**—As to whether the abutting property owner is entitled to damages for construction of a telegraph line upon a highway, there is great conflict of decisions, but the weight of authority inclines to support his right to damages, even though nominal. A telegraph company, authorized to use the streets, is not liable to the owners of abutting property for setting up its poles or stringing its wires in the streets or alleys.<sup>6</sup> Where the company is liable to damages in a suit at law, injunction will not lie at the instance of an abutting property owner against the erection of the poles in the street, in front of his property.<sup>7</sup> Injunction will lie to restrain such owner from cutting down the poles.<sup>8</sup> Although the city assent to the occupation of the streets by the telegraph company's poles, an abutting property owner may maintain ejection against the company.<sup>9</sup> Although the line be constructed upon the right-of-way of a railroad company, ejectment will lie at the instance of such abutting owner, unless the telegraph company pay damages equal to what would be awarded upon condemnation.<sup>10</sup> If the fee to the street vests in the abutting property owners they may recover

<sup>1</sup> Alaska Min. Co. v. Whelan, 168 U. S. 86 (1897).

<sup>2</sup> Western U. T. Co. v. Eyser, 91 U. S. 495 (1875).

<sup>3</sup> Western U. Tel. Co. v. Los Angeles, etc. Co. (1896), 76 Fed. Rep. 178.

<sup>4</sup> Newark, etc. Co. v. Garden, 78 Fed. Rep. 74 (1896).

<sup>5</sup> Northwestern T. Co. v. Anderson (N. D. 1904), 98 N. W. 706.

<sup>6</sup> Taylor v. Portsmouth (1898), 91 Me. 195, 64 Am. St. Rep. 216;

Pierce v. Drew (1883), 136 Mass. 75, 49 Am. Rep. 7; People v. Eaton (1894), 100 Mich. 208, 24 L. R. A. 721.

<sup>7</sup> Maxwell v. Central, etc. Co., 51 W. Va. 121 (1902).

<sup>8</sup> Western U. T. Co. v. Bullard (1895), 67 Vt. 272.

<sup>9</sup> Postal, etc. Co. v. Eaton, 170 Ill. 513 (1897), 39 L. R. A. 722.

<sup>10</sup> Fuselier v. Great, etc. Co., 50 La. Ann. 799 (1898), 24 So. 274.

damages from the telegraph company, for the additional easement.<sup>11</sup>

**§ 1093. (i) Furnishing market quotations to a "bucket-shop."** A telegraph company can not be enjoined from removing its telegraph wires from a "bucket-shop."<sup>12</sup> It can not be required to deliver messages giving market quotations to a "bucket-shop,"<sup>13</sup> nor to race course "book-makers." A "ticker" company can not insist upon removing its "ticker" from its patron's office upon its own judgment as to breach of agreement.<sup>14</sup> Where an unincorporated stock exchange furnished market quotations (they being its own property-right), to a telegraph company, and contracted with it to furnish the quotations to such persons only as the exchange should approve, the telegraph company was not bound to furnish the quotations to a person, contrary to the orders of the exchange.<sup>15</sup>

**§ 1094. (k) Wires underground. Subways.**—The legislature may require telegraph companies to place their wires underground,<sup>16</sup> and a city so empowered by the legislature may compel a telegraph or telephone company to place its overhead wires into underground conduits constructed by the city or by private corporation under authority of the city,<sup>17</sup> but such requirement can be enforced only when it is reasonable and necessary, and when demanded by public safety and convenience, and not when exercise of the power amounts to destruction of the property rights of the company, or a breach of the city's contract with the company in authorizing construction of its line.<sup>18</sup> Where the statutes compel private corporations to place their wires, in a city, underground, the city can not continue to operate its wires overhead for fire or police purposes, but must also place its wires underground.<sup>19</sup> A city may, by ordinance, authorize a private corporation to construct an underground conduit for electric wires,<sup>20</sup> and

<sup>11</sup> Phillips v. Postal, etc. Co. (1902), 130 N. C. 513, 89 Am. St. Rep. 868.

<sup>12</sup> Sterrett v. Philadelphia, etc. T. Co., 18 W. N. Cas. 77.

<sup>13</sup> Smith v. Western U. T. Co. (1887), 84 Ky. 664, 2 S. W. 483.

<sup>14</sup> Smith v. Gold, etc. T. Co., 42 Hun, 454 (1886).

<sup>15</sup> Matter of Renville (1899), 46 N. Y. App. Div. 37.

<sup>16</sup> People v. Squire (1892), 145 U. S. 175; American R. T. Co. v. Hess (1891), 125 N. Y. 641.

<sup>17</sup> City of Rochester v. Bell, etc. Co. (1900), 52 N. Y. App. Div. 6; Geneva v. Geneva Tel. Co., 30 N. Y. Misc. Rep. 236 (1900).

<sup>18</sup> Northwestern T. Co. v. Minneapolis (1901), 81 Minn. 140, 53 L. R. A. 175; Hudson, etc. Co. v. City of Johnstown (1902), 37 N. Y. Misc. Rep. 41.

<sup>19</sup> Prentiss v. Cleveland T. Co. (1894), 32 W. L. Bull. 13 (Ohio).

<sup>20</sup> State v. St. Louis (1898), 145 Mo. 551, 42 L. R. A. 113, 46 S. W. 981.

may be enjoined from afterward repealing such ordinance or interfering with the work so authorized.<sup>21</sup> Abutting property owners are not entitled to any additional compensation for such underground construction.<sup>22</sup>

**§ 1095. (1) Submarine telegraph cable. "Navigable mud."**—A submarine telegraph, or electric cable, is a line of telegraph laid under any body of water, for transmission of telegraphic messages between the stations thereby connected. The wires are insulated and protected by enclosure within material impervious to water. The cable, of one or more copper wires, called the core, is embedded in insulating and protecting gutta-percha, and covered by coils of iron wire. In 1884, the United States entered into a treaty with nearly all nations, for protection of submarine cables, making criminal any injury thereto, unless done in effort to save a vessel or human life,<sup>23</sup> and by act of Congress, it prescribed penalties for violation of the treaty.<sup>24</sup> Where the ship's crew, in effort to release its anchor from a submarine cable, broke it, no negligence being shown, the vessel was held not liable.<sup>25</sup> Where the anchor became entangled with a submarine cable, and the vessel officers cut the cable instead of cutting away the anchor, the ship was held liable for the damage.<sup>26</sup> Express authority of Congress is not required by domestic corporations,—whether with or without the authority of a State,—to land an electric cable line upon the shore of the United States;<sup>27</sup> but in doing so it is subject to any subsequent action of Congress, in exercise of its power to regulate international and interstate commerce.<sup>28</sup> Subject always to the paramount power of the United States over its navigable waters, and to remove obstructions to their navigation, a State may authorize the laying of a cable on the bottom of any of its own tidal and navigable streams. Where so laid, a cable is not obstruction to navigation.<sup>29</sup> Unless the incorporation of a company was duly authorized for telegraph purposes, it can not recover for damages to its cable, injured by the anchor of a ves-

<sup>21</sup> Chesapeake, etc. Co. v. Mayor, etc. (1899), 89 Md. 689, 90 Md. 638 (1900).

<sup>22</sup> Castle v. Bell, etc. Co. (1900), 49 N. Y. App. Div. 437; Coburn v. New Tel. Co. (1901), 156 Ind. 90.

<sup>23</sup> 24 U. S. Stat. at L. 989.

<sup>24</sup> 25 U. S. Stat. at L. 41.

<sup>25</sup> The Anita Berwind (1901), 107 Fed. Rep. 721.

<sup>26</sup> The William H. Bailey, 100 Fed. Rep. 115 (1900).

<sup>27</sup> United States v. La Compagnie, etc. (1896), 77 Fed. Rep. 495.

<sup>28</sup> De Castro v. Compagnie, etc. (1895), 85 Hun, 231, 155 N. Y. 688.

<sup>29</sup> Ladd v. Foster, 31 Fed. Rep. 827 (1887), 12 Sawy. 547.

sel.<sup>30</sup> A cable in "navigable mud" as between New York and Jersey City is at risk of the owner, and he is liable for injury by it to a passing steamer.<sup>31</sup> This so-called "navigable mud" is silt or mud next to the bottom of the Hudson River. From time to time, it varies in consistency, and is removable only by dredging. The ability of a ship to plow through it, is the practical test of the true line of division between it and the real bottom of the river.<sup>32</sup> Where, at Albany, there were ten cables running across, and under the Hudson River, and a tugboat was injured by one of them, escaping all others, it was allowed damages against the cable owner.<sup>33</sup>

**§ 1096. (m) Telegram code book. Infringement of copyright.**—In England, where plaintiff published and copyrighted "The Standard Code," a book of words from eight languages, for use in sending cipher and other telegrams, and defendants, from a copy of it, compiled an independent work, as their private telegraph code, for their own use and that of their agents at home and abroad, but did not print it for sale or exportation, defendants were held to have infringed the copyright and were perpetually enjoined.<sup>34</sup>

**§ 1097. (n) Cipher message. Liability for failure to transmit.** Where a cipher telegram is plainly written in the letters of the English alphabet, the fact that the operator does not know the meaning of the words used, is no excuse for a failure to transmit or deliver the telegram,<sup>35</sup> even though the telegraph company stipulated for limitation of its liability for mistakes, or delays, in transmission of cipher dispatches.<sup>36</sup>

**§ 1098. (o) Wireless telegraphy. Aerogram.**—"Wireless telegraphy is based on the utilization of the Hertzian magnetic waves, which are identical with light waves, but are of quarter length, and travel through space with equal velocity. They affect all magnetic material, and make it possible to use them for carrying messages. Whenever an electric spark is made to jump from one electrode to another, these Hertzian waives are produced.

<sup>30</sup> Doboy, etc. v. De Magathias (1885), 25 Fed. Rep. 697.

<sup>31</sup> Western U. T. Co. v. Inman, etc. Co. (1890), 43 Fed. Rep. 85, 59 Fed. Rep. 365 (1894).

<sup>32</sup> Joyce on Electric Law, § 74.

<sup>33</sup> Blanchard v. Western U. T. Co. (1875), 60 N. Y. 510.

<sup>34</sup> Ayer v. Peninsular, etc. Nav. Co., 26 Law Rep. Ch. Div. 637.

<sup>35</sup> Western U. T. Co. v. Hyer Bros., 22 Fla. 637.

<sup>36</sup> Western U. T. Co. v. Way, 80 Ala. 542; *Vide supra*, § 1089, note 75.

Their rapidity is varied by variations in the spark-producing apparatus, so that instruments used for sending and receiving signals by their medium can be attuned to one another, and made invulnerable to attacks of other waves of dissimilar periods. The circuit runs through a spark-coil with an oscillator, or interrupter, to produce continuous "sparking," so long as the circuit is kept closed by the key. From this the secondary or sparking-wire runs out of doors, and to the pole from which the messages are to be sent. The two ends of the wire terminate in small metal spheres, between which the sparks pass. One of these wires extends to the earth, and the other extends vertically into the air."<sup>37</sup> "Aerogram" is the term applied to a message by wireless telegraph. The American De Forest Wireless Telegraph Company controls the leading system of wireless telegraphy in the world, and is now practically the only wireless company doing business in America.

*De Forest system described.*—The complete system is the work of Dr. Lee De Forest, an American, who took out his first patent at Washington in 1900. Since then more than one hundred new patents have been granted on various improvements. The system differs from all other wireless systems, in nearly every essential feature. Where they use coherers, De Forest uses an electrolytic responder. The method of sending differs from Marconi's, which uses direct current, and induction coils and interrupters, while De Forest uses alternating current, a "step-up" transformer, and the spark-gap.

*Sending.*—"In small stations, 10 amperes at 110 volts is used on the primary circuit, in which is the sending key, a regular Morse instrument. From the key the current flows to the reactance coil and then into the transformer, where it is raised to about 10,000-volt pressure. In large stations, for sending long distances, 50 amperes at 250 volts is transformed to 20,000 or 30,000 volts pressure. From the secondary side of the transformer, the current is carried, at the high pressure, to condensers, for which Leyden jars are used in small stations, and special plate-glass condensers in big ones. Here the current is stored momentarily until the spark-gap breaks down. The loud spark, formed as the current jumps the gap, sets up intense electrical vibrations in the antennæ wires leading from the points to the atmosphere, and carried high enough to clear any obstructions, such as the steel frames of

<sup>37</sup> Brief extracts from Marconi's See, in full, Joyce on Electric Law, description in the New York Sun. § 3.

buildings, which would weaken the Hertzian waves sent outward from the antennæ in every direction. The spark-gap is also connected with the earth—grounded, as this is found to strengthen the effect, giving greater carrying power.

*Receiving.*—These waves, or vibrations, coming in contact with the antennæ of distant stations, travel down to the ground, passing through the receiving apparatus on the way. This consists of the tuner and electrolytic responder. The tuner is used to catch only such waves as are in syntonism with the instrument's various parts.”<sup>38</sup>

§ 1099. Telephone companies. Telephone and “telapheme” defined.—A telephone is a wire and all connecting apparatus used for transmitting articulate speech by the agency of electricity, or is an apparatus for reproducing sound over a conducting cord or wire.<sup>39</sup> A telephonic message is called a “telapheme.”<sup>40</sup>

§ 1100. (a) Its right and liabilities similar to those of telegraph company.—The rights and liabilities of a telephone corporation, especially in the erection of its poles on streets and highways, are similar to those of telegraph companies; and where the statute names telegraph companies, it is usually held to include telephone companies.<sup>41</sup> A telephone system may be owned and operated by an individual instead of by a corporation, in the absence of any contrary statute. A statute prohibiting organization of a competing telephone company, without consent of one existing, does not preclude construction of a competing line by an individual.<sup>42</sup> The legislature may reduce rates of charge, if excessive,<sup>43</sup> but private telephones rented to individuals and not connected with any public exchange, are not affected by an act of Congress reducing telephone rates.<sup>44</sup> A city may not reduce the rates where they were fixed under its authorized contract with the telephone company.<sup>45</sup> Such a grant to the company from a city is an irrevocable contract,<sup>46</sup> unless the city reserved the right to

<sup>38</sup> “Chicago the Electric City,” Dec., 1904.

<sup>39</sup> Century Dict., p. 6216.

<sup>40</sup> Standard Dict., p. 1851.

<sup>41</sup> San Antonio, etc. Ry. v. Southwestern, etc. Co. (1900), 93 Tex. 313, 49 L. R. A. 459.

<sup>42</sup> Magee v. Overshiner (1898), 150 Ind. 127, 77 Am. St. Rep. 884, 40 L. R. A. 370, 65 Am. St. Rep. 358.

<sup>43</sup> Central, etc. Co. v. State, 118 Ind. 194 (1899), 10 Am. St. Rep. 114.

<sup>44</sup> Chesapeake, etc. Co. v. Manning (1902), 186 U. S. 238.

<sup>45</sup> Detroit v. Detroit, etc. Ry. (1902), 184 U. S. 368.

<sup>46</sup> City of Duluth v. Duluth, etc. Co., 84 Minn. 486 (1901).

revoke the grant.<sup>47</sup> A telephone corporation must furnish equal facilities and privileges of connection to all telegraph companies, and *mandamus* will lie to compel such equal service.<sup>48</sup> A city ordinance granting to a telephone company, "its successors and assigns," the right to establish its wires and poles in the streets, is, under the laws of Kansas, an assignable franchise. Though in the title of the ordinance, the words "successors and assigns" are not mentioned, a grant of all its property and franchises by the grantee passes title to the telephone franchise. Although no term was named in the grant by the city, it continues for twenty years under the statutes.<sup>49</sup>

**§ 1101. (b) Mandamus to put phone in residence.**—*Mandamus* will lie to compel a telephone company to put a telephone in a residence.<sup>50</sup>

**§ 1102. (c) Its property taxable as personality.**—A telephone line is personal property and subject as such to sale under execution.<sup>51</sup> A telephone company requires no express authority to sell all its property and franchises.<sup>52</sup> Under a statute authorizing erection by telephone companies, of telephone lines upon the highways, such a company requires no municipal authority to erect its lines in a city, or over an incorporated bridge.<sup>53</sup> A telephone company can not enjoin another from setting its poles or stretching its wires at safe distances from those of the other company.<sup>54</sup>

<sup>47</sup> *Southern, etc. Co. v. City of Richmond* (1899), 98 Fed. Rep. 671.

<sup>48</sup> *State v. Delaware, etc. Co.*, 47 Fed. Rep. 633 (1891); *State v. Bell Tel. Co.* (1885), 23 Fed. Rep. 539.

<sup>49</sup> *Old Colony T. Co. v. City of Wichita* (1903), 123 Fed. 762.

<sup>50</sup> *State v. Citizens' Tel. Co.*, 61 S. C. 83 (1901), 39 S. E. 257.

<sup>51</sup> *Redfield, etc. Co. v. Cyr*, 95 Me. 287 (1901).

<sup>52</sup> *People v. Central, etc. Co.*, 192 Ill. 307 (1901), 85 Am. St. Rep. 338.

<sup>53</sup> *Abbott v. City of Duluth*, 104 Fed. Rep. 833 (1900).

<sup>54</sup> *Louisville, etc. Co. v. Cumberland, etc. Co.* (1900), 111 Fed. Rep. 663.

## CHAPTER XLV.

### EXPRESS COMPANIES, COMMON CARRIERS.

§ 1103. Express company's duties and liabilities.	§ 1107. (c) Termination of carrier's liability.
1104. Common carriers. Definition, duties and liabilities.	1108. (d) Carrier's liability on connecting lines.
1105. (a) Carrier's liability for loss or injury to goods.	1109. (e) Carriers of passengers.
1106. (b) Contract against carrier's liability for negligence.	1110. (f) Legislative control of common carriers.

**§ 1103. Express company's duties and liabilities.**—A railroad company may allow one express company, exclusively, to do the express business on its line. The rights and liabilities of an express company are those of a common carrier. A railroad company is a common carrier of goods and passengers, but not a common carrier of common carriers.<sup>1</sup> A railroad corporation is obliged to furnish reasonable express accommodations, but by such agencies as it may employ. So long as its service to the public is satisfactory, a railroad corporation may retain to itself, and carry on, the express business upon its line.<sup>2</sup> An exclusive contract between an express company and a railroad corporation to do the express business of all the railway system, falls as to the whole system, upon its insolvency, disintegration, and refusal of the receiver of the main company to continue the contract.<sup>3</sup> The corporation is entitled, as a common carrier, to collect its charges in advance.<sup>4</sup>

**§ 1104. Common carriers. Definition, duties, and liabilities.** In its duties and liabilities to the public, express companies are the best illustration of that class of *quasi-public* corporations, which are strictly common carriers. A common or public carrier of goods is one who engages in the business of transporting goods

<sup>1</sup> Express Cases (1885), 117 U. S. 1.

<sup>2</sup> Sargent v. Boston, etc. R., 115 Mass. 416 (1874).

<sup>3</sup> Smith v. Wells, etc. Co., 96 Fed. Rep. 375 (1899).

<sup>4</sup> Southern Ind. Express Co. v. U. S. Exp. Co. (1898), 88 Fed. Rep. 659.

or freight on land or water, for all who choose to employ him for reward.<sup>5</sup> His duty being a public one, he must accept the kind of goods which he holds himself out to carry, providing the owner or consignee will pay the freight.<sup>6</sup> He is liable in damages to the owner for refusal to transport the goods, but he may refuse goods improperly packed, or otherwise unfit for carriage,<sup>7</sup> or where they may be harmful to other goods already received.<sup>8</sup> His undertaking is to carry only by the usual and customary routes.<sup>9</sup>

**§ 1105. (a) Carrier's liability for loss or injury to goods.**—A common carrier is an insurer of the goods he carries, against loss or damage, except that caused by the act of God, or of the public enemy, or act of the public authorities, or act of the shipper, or by inherent nature of the goods; and even then he is liable, if his negligence contributes to the loss.<sup>10</sup> A common carrier has a double liability as to the goods entrusted to his care, one as an insurer, and the other as to his negligence or care.<sup>11</sup>

**§ 1106. (b) Contract against carrier's liability for negligence.** His stipulations or contracts, usually in printed form of receipt, against liability for his own negligence, are held to be void, as contrary to public policy. Such a contract will not relieve in case of negligence, and proof of loss raises presumption of negligence.<sup>12</sup>

**§ 1107. (c) Termination of carrier's liability.**—As to termination of the common carrier's liability, there are two lines of decisions. The one is that of the Massachusetts Supreme Court of 1854, holding that his liability, as insurer of goods, ceased the moment they were removed from the cars and put in a safe place on its platform, or within its depots, and that thenceforward till delivery of the goods, the carrier's liability was only that of a

<sup>5</sup> *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397.

<sup>6</sup> *Chicago, etc. R. R. v. Jones*, 149 Ill. 361, 24 L. R. A. 141, 41 Am. St. Rep. 278.

<sup>7</sup> *Union Ex. Co. v. Graham*, 26 Ohio St. 595.

<sup>8</sup> *Nitro Glycerine Case*, 15 Wall. 524.

<sup>9</sup> *Merchants,' etc. Co. v. Kohn*, 76 Ill. 520.

<sup>10</sup> *Willock v. Pa. R. R. Co.*, 166 Pa. St. 184, 45 Am. St. Rep. 674; *Long v. Pa. R. R. Co.*, 147 Pa. St. 343; *Liverpool Steamship Co. v.*

*Phenix Ins. Co.*, 129 U. S. 397; *Railway Co. v. Nevill*, 60 Ark. 375, 46 Am. St. Rep. 208; *McCarthy v. Louisville R. R. Co.*, 102 Ala. 193, 48 Am. St. Rep. 29; *Selby v. Wilmington, etc. Ry. Co.*, 113 N. C. 588.

<sup>11</sup> *Railroad Co. v. Lockwood*, 17 Wall. 363.

<sup>12</sup> *Cooley's Elements of Torts*, 290; *Hudson v. North Pac. Ry. Co.*, 92 Iowa, 231, 54 Am. St. Rep. 550; *Adams Express Co. v. Harris* (1889), 120 Ind. 73, 7 L. R. A. 214; *Merchants,' etc. Co. v. Bloch*, 86

warehouseman.<sup>13</sup> This rule is followed in Illinois, Indiana, Iowa, Georgia, California, Missouri, North Carolina, Tennessee and South Carolina. The other and different rule, laid down by the New Hampshire court in 1856, is that the carrier's liability as insurer of the goods ceases only when the consignee had a reasonable time after their arrival to accept and remove them.<sup>14</sup> This rule is followed by the courts of Alabama, Louisiana, Kentucky, New Jersey, Kansas, Ohio, Vermont, Wisconsin, New York, Michigan, Minnesota, Texas, Connecticut and Pennsylvania.

**§ 1108. (d) Carrier's liability on connecting line.**—The carrier is not obliged to accept goods for shipment beyond his own terminus, but if he does, he may limit his responsibility thereto.<sup>15</sup>

**§ 1109. (e) Carriers of passengers.**—A common carrier is not liable as insurer of the life or safety of passengers, but is bound to exercise the highest degree of care. In case of injury by accident, the carrier's negligence is presumed. "Since the decisions in *Stokes v. Saltonstall*, 13 Pet. 181, and *Railroad Co. v. Pollard*, 22 Wall. 341, it has been a settled law in this court, that the happening of an injurious accident is, in passenger cases, *prima facie* evidence of negligence on the part of the carrier; and that (the passenger being himself in the exercise of due care), the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. The rule announced in those cases, has received general acceptance, and was followed thereafter in *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551."<sup>16</sup> The carrier is liable for the negligence or even the wanton, wilful acts of its servants in reference to passengers.<sup>17</sup>

**§ 1110. (f) Legislative control of common carriers.**—The sovereign has always assumed peculiar control over common carriers, as conducting a business in which the public has an interest; and in the case of railway carriers an additional basis of govern-

Tenn. 392 (1888), 6 S. W. 881, 6 Am. St. Rep. 847; Adams Express Co. v. Hoeing (1889), 88 Ky. 373, 11 S. W. 205.

<sup>13</sup> *Norway Plains Co. v. Boston, etc. Co.* (1854), 1 Gray, 263, 61 Am. Dec. 143.

<sup>14</sup> *Moses v. Railroad Co.* (1856), 32 N. H. 523; Andrews' American Law, § 619.

<sup>15</sup> *Illinois Central Ry. Co. v.*

*Copeland*, 24 Ill. 332, 76 Am. Dec. 749; *Illinois Central Ry. Co. v. Frankenberg*, 54 Ill. 88.

<sup>16</sup> *Gleeson v. V. M. Ry.*, 140 U. S. 435; *Stokes v. Salstonshall*, 13 Pet. 181; *Railroad Co. v. Pollard*, 22 Wall. (U. S.) 341; *Inland, etc. Co. v. Tolson*, 139 U. S. 551.

<sup>17</sup> *Boumeister v. G. R. & I. Ry. Co.*, 63 Mich. 557.

mental control is grounded in the extraordinary franchise of eminent domain conferred upon these companies.<sup>18</sup> For corporations engaged in carrying goods for hire as common carriers, have no right to discriminate in freight rates in favor of one shipper, even when necessary to secure his custom, if the discriminating rate will tend to create a monopoly by excluding from their proper markets the products of the competitors of the favored shipper.

<sup>18</sup> State v. Cincinnati, W. & B. Ry. Co. (1890), 47 Ohio St. 130, 23 N. E. Rep. 928, holding that where a railroad company fixes a rate of freight per hundred pounds, for carrying petroleum oil in iron tank cars, substantially

lower than its rate for transporting it in barrels in car-load lots, it is exercising a "franchise, privilege, or right in contravention of law," within the meaning of the fourth clause of section 6761, Ohio Rev. Stat.

## CHAPTER XLVI.

### OTHER QUASI-PUBLIC CORPORATIONS.

#### § 1111. Other *quasi*-public corporations.

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###### .GASWORKS.

1112. Gas company. Duties and liabilities. May require deposit. Cutting off supply. Powers of cities. Natural-gas, etc.

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and not to the policy-holders. Limited to authorized line of insurance.

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**§ 1111. Quasi-public corporations.**—Railroads, street railways, telegraphs, etc., having been treated in the next preceding chapters as the most important corporations owing special duties to the public, it remains to consider herein, severally, other *quasi-public* corporations. As a class, they have already been treated in Section 1032.

## A.

## GASWORKS.

**§ 1112. Gas companies. Duties and liabilities.** May require deposit. Cutting off supply. Powers of cities. Natural gas, etc.—Gas companies, being engaged in a business of a public character, are charged with the performance of public duties. Their use of the streets, whose fee is held by the municipal corporation in trust for the benefit of the public, has been likened to the exercise of the power of eminent domain.<sup>1</sup> Accordingly, a

<sup>1</sup> *Vide supra*, § 924; Chicago Gas-Light & Coke Co., 121 Ill. 530. Gas-Light & Coke Co. v. People's In Gibbs v. Baltimore Gas Co., 130

gas company is bound to supply gas to premises with which its pipes are connected. It may, however, impose reasonable conditions, such as requiring a deposit to secure payment.<sup>2</sup> And a statute imposing a penalty on gas-light companies which for ten days after an application for gas neglect to supply it, is held to apply where, although gas has been furnished within the ten days, there is a neglect to give a continuous supply.<sup>3</sup> Where there is a probability that a gas company may have made an erroneous charge, notwithstanding the apparent registry of its meter, it will be restrained by injunction from cutting off the supply from the premises until the accuracy of the charge can be determined by a suit at law.<sup>4</sup> Where a gas company agreed to furnish gas to plaintiff at his place of business, reserving to itself the right to refuse to furnish, or at any time to discontinue gas to any premises, the owner or occupant of which should be indebted to the company for gas or fittings used upon the premises or elsewhere,—it was held that the company could not shut off the gas on account of an unpaid debt previously contracted by plaintiff, at a house from which he had moved before making this contract.<sup>5</sup> The right of a gas company to lay pipes in the streets, can be conferred only by the legislature. It may delegate its power to a municipality, but under its ordinary powers, a city has no authority to lay down gas pipes in the streets. Usually, the legislature, by a general statute, grants in advance, its authority, to vest in a gas company, upon the city's assent thereto.<sup>6</sup> The gas company's privileges in the streets may be granted by city ordinance to extend beyond the term of the company's existence, and when granted, the privileges constitute an irrevocable contract, in the ab-

U. S. 396, 6 Ry. & Corp. L. J. 22, the supreme court of the United States, in an able opinion delivered by Mr. Chief Justice Fuller, uses these words: "These gas companies entered the streets of Baltimore under their charters in the exercise of the equivalent of the power of eminent domain, and are to be held as having assumed an obligation to fulfill the public purposes to subserve which they were incorporated." *Cf.* "Gas Legislation," 43 L. T. 192.

<sup>2</sup> Williams v. Mutual Gas Co., 52 Mich. 499, 50 Am. Rep. 266.

<sup>3</sup> Meiers v. Metropolitan Gas-Light Co., 11 Daly, 119, construing N. Y. Laws of 1839, ch. 311, § 6.

<sup>4</sup> Sickles v. Manhattan Gas-Light Co., 66 How. Pr. 305, 314, 64 How. Pr. 33, holding also that the N. Y. Act of 1859 does not confer upon a gas company an unqualified right to shut off the gas in such a case.

<sup>5</sup> Lloyd v. Washington Gas-Light Co., 1 Mackey (D. C.), 331.

<sup>6</sup> New Orleans Gas Co. v. Louisiana Light Co. (1885), 115 U. S. 650; Newport v. Newport, etc. Co. (1886), 84 Ky. 166.

sence of reserved power to repeal.<sup>7</sup> The legislature may grant an exclusive right to a gas company to furnish a particular town with gas, but this will not prevent the city from establishing its own plant for furnishing electric light.<sup>8</sup> The gas company can not enjoin the city from constructing its own gasworks at the city's expense.<sup>9</sup> Without express authority a city can not grant an exclusive right to a gas company to furnish gas in the city.<sup>10</sup> An exclusive right to supply gas for light, does not give power to furnish gas for heat,<sup>11</sup> nor authority to furnish natural gas.<sup>12</sup> The company has no right to charge any higher rate to one consumer of gas than to another.<sup>13</sup> It can not charge more for gas used for light than for that used for heat.<sup>14</sup> The State may forfeit the charters of competing gas companies, for combining to fix and maintain rates.<sup>15</sup> The legislature, or the city, if expressly authorized by the legislature, has power to reasonably reduce the rate of charge to consumers, when it is excessive; unless the rate was fixed in the charter contract with the company.<sup>16</sup> A gas company may be authorized to condemn land for right-of-way for its pipes and mains, but not unless it furnishes gas to the public.<sup>17</sup> A natural gas company may condemn a right-of-way for laying its pipes along a country road.<sup>18</sup> The consent of the city is sufficient authority to the company to lay its pipes under the streets.<sup>19</sup> Without express authority a gas company can not lease or sell its plant.<sup>20</sup> Under franchise from a city to a gas company, its "suc-

<sup>7</sup> *Levis v. Newton* (1890), 75 Fed. Rep. 472; *Keith v. Johnson* (Ky. 1900), 59 S. W. Rep. 487.

<sup>8</sup> *Capital City, etc. Co. v. Tallahassee* (1902), 186 U. S. 401.

<sup>9</sup> *Hamilton Gaslight, etc. Co. v. Hamilton* (1889), 37 Fed. Rep. 832; *Hamilton, etc. Co. v. Hamilton City* (1892), 146 U. S. 258.

<sup>10</sup> *Newport v. Newport, etc. Co.* (1886), 84 Ky. 166.

<sup>11</sup> *Keystone, etc. Co. v. Williamsport Gas Co.* (1892), 2 Pa. Dist. 85.

<sup>12</sup> *Warren Gaslight Co. v. Pennsylvania Gas Co.* (1894), 161 Pa. St. 510.

<sup>13</sup> *Indiana, etc. Co. v. State* (Ind. 1902), 63 N. E. Rep. 220, 57 L. R. A. 761.

<sup>14</sup> *Bailey v. Gas Fuel Co.* (1899), 193 Pa. St. 175.

<sup>15</sup> *State v. Portland, etc. Co.*

(1899), 153 Ind. 483, 53 L. R. A. 413, 74 Am. St. Rep. 314.

<sup>16</sup> *State v. Laclede Gaslight Co.* (1890), 102 Mo. 472, 22 Am. St. Rep. 789; *Indianapolis Gas Co. v. Indianapolis* (1897), 82 Fed. Rep. 245.

<sup>17</sup> *Consumers', etc. Co. v. Harless* (1892), 131 Ind. 446, 15 L. R. A. 505; *Great Western, etc. Co. v. Hawkins* (Ind. 1903), 66 N. E. Rep. 765.

<sup>18</sup> *Hamilton Co. v. Indianapolis, etc. Co.* (1893), 134 Ind. 209.

<sup>19</sup> *McDewitt v. People's Nat. Gas Co.* (1894), 160 Pa. St. 367.

<sup>20</sup> *Visalia, etc. Co. v. Sims* (1894), 104 Cal. 326, 43 Am. St. Rep. 105; *City of Kalamazoo v. Kalamazoo, etc. Co.* (1900), 124 Mich. 74.

cessors and assigns," it may, without other consent from the city, sell out its property and franchise to another company.<sup>21</sup> Gas pipes laid under the street are taxable as real estate.<sup>22</sup> A statute prohibiting the piping of natural gas to points beyond the limits of the State is unconstitutional and void.<sup>23</sup> A gas company authorized to lay pipes in the public streets, in a way to occasion the least inconvenience to the public, acquired no vested right to occupy any particular part of the street, but in such occupation and in shifting of the position of the gas mains, the company is subject to legislative and municipal regulation.<sup>24</sup> Authority to one company to supply either gas or electricity or both, excludes the right of another company to supply either gas or electricity in the same town, unless by consent of such other company, or by special authority of the legislature.<sup>25</sup> A gas company incorporated under laws authorizing it to use the streets of a town or city wherein to lay its mains, with consent of the municipal authorities, may lay mains in new streets, thereafter opened, without further consent of such municipality.<sup>26</sup> A natural gas company authorized to furnish gas for fuel, may under contract with the municipal authorities furnish natural gas for illumination without obtaining consent of the qualified voters, though an existing company furnishes artificial gas for illuminating purposes.<sup>27</sup>

## B.

### WATERWORKS.

**§ 1113. Waterworks corporation. Authority must come from the legislature.**—A city has no common-law power to grant a franchise for operation of waterworks. Its power must come from the legislature.<sup>28</sup> A city may contract with individuals to supply water, with authority in them to fix the rates, and such

<sup>21</sup> Providence Gas Co. v. Thurber (1851), 2 R. I. 211, 55 Am. Dec. 621.

<sup>22</sup> Capital, etc. Co. v. Charter, etc. Co. (1874), 51 Iowa, 31.

<sup>23</sup> Benedict v. Columbus, etc. Co. (1892), 49 N. J. Eq. 23.

<sup>24</sup> New Orleans Gaslight Co. v. Drainage Comm'rs, etc. (La. 1903), 35 So. 929.

<sup>25</sup> Twin Village Water Co. v. Damariscotta, etc. Co. (1903), 98 Me. 32, 56 Atl. 1112.

<sup>26</sup> People v. Cromwell (N. Y. 1903), 85 N. Y. S. 878, 89 App. Div. 291.

<sup>27</sup> Circleville, etc. Co. v. Buckeye Gas Co. (Ohio, 1903), 69 N. E. 436.

<sup>28</sup> Pikes Peak, etc. Co. v. Colorado Springs (1900), 105 Fed. Rep. 1; Los Angeles, etc. Co. v. City of Los Angeles (1898), 88 Fed. Rep. 720.

contract may be assigned to a water company.<sup>29</sup> Without express authority in its charter the city has no power to grant an exclusive privilege. It can not do so under express power to contract for waterworks.<sup>30</sup> Only the State can grant such a monopoly, and then only when unrestrained by constitutional provisions.<sup>31</sup> A contract by a city, authorized by the legislature, giving exclusive rights to a waterworks company is irrevocable, and is protected under the federal constitution.<sup>32</sup> An authorized grant by a city to a company to establish waterworks, if not limited as to time, is perpetual and irrevocable when accepted and acted upon.<sup>33</sup> A city under contract with a water company for general protection from fire, can not maintain suit against a water company for municipal property destroyed by fire, because of the company's failure to supply a sufficiency of water.<sup>34</sup> Where the statute authorized a waterworks company to take water only from designated sources, one only of which was available, the city afterward purchasing the works, was held limited to the same sources of supply as was the water company whose works it purchased.<sup>35</sup> A city can not have annulled its contract with another corporation, to have constructed a system of waterworks, without clearly showing on the part of defendant, non-performance of the conditions of the contract.<sup>36</sup> A minimum charge by a water company for meter service to small consumers, is not unreasonable because the charge is not proportionate to what a large consumer would pay for the quantity used by him.<sup>37</sup> Though the period has expired for which the franchise was granted to a water company for its waterworks, by a city, it may be enjoined from taking the plant in an unlawful manner.<sup>38</sup> It is a reasonable regulation, by a water company au-

<sup>29</sup> Santa Ana Water Co. v. San Buenaventura (1893), 56 Fed. Rep. 339.

<sup>30</sup> City of Brooklyn (1894), 166 U. S. 685.

<sup>31</sup> Westerly Waterworks v. Westerley (1896), 75 Fed. Rep. 181; Bienville, etc. Co. v. Mobile (1902), 186 U. S. 212; Long v. Duluth (1892), 49 Minn. 280, 32 Am. St. Rep. 547; Altgeld v. San Antonio (1890), 81 Tex. 436, 13 L. R. A. 383; Illinois, etc. v. Arkansas, etc. (1895), 67 Fed. Rep. 196.

<sup>32</sup> Vicksburg, etc. Co. v. Vicks-

burg (1902), 185 U. S. 65; New Orleans, etc. Co. v. Rivers (1885), 115 U. S. 674; Stein v. Bienville, etc. Co. (1891), 141 U. S. 67.

<sup>33</sup> National Waterworks Co. v. Kansas City (1895), 65 Fed. Rep. 691.

<sup>34</sup> Ukiah City v. Ukiah, etc. Co. (Cal. 1904), 75 Pac. 773.

<sup>35</sup> Smith v. Town of Stoughton (Mass. 1904), 70 N. E. 195.

<sup>36</sup> City of El Reno v. El Reno, etc. Co. (Okla. 1904), 76 Pac. 126.

<sup>37</sup> Wilson v. Tallahassee, etc. Co. (Tex. 1904), 36 So. 63.

<sup>38</sup> City of Leavenworth v.

thorized to supply water to the inhabitants of a city, to require, in furnishing water for street sprinkling, that those engaged in that business shall obtain license from the company, and to refuse to grant such license except to the applicant having the largest list of petitioners as abutting property owners.<sup>39</sup> Consent of a city to the sale and transfer of all the property and franchises of a water company, is insufficient without such authority under statutes of the State.<sup>40</sup> Grant, by a city to a water company for twenty years, to establish and maintain its works, sufficient to fully supply water to the inhabitants for five years, reserving the right to the city to construct works or plants for public purposes, was not an implied condition that the city would not enter into competition with such company during all or any part of the twenty years.<sup>41</sup> Authority to a water company to lay its pipes in streets of any city, adjoining a city or town where such authority has been granted, is not authority to supply water in such adjoining city or town.<sup>42</sup> Where a city contracted to pay annually for a term of years, hydrant rental to a water company, or its trustee for its bonds, such trustee of subsequently issued bonds, secured by mortgage on all the company's property and rights under the contract, may, independent of the company, enjoin the city from any impairment of the company's rights under the contract, the city having repudiated it.<sup>43</sup> A water company has no power to direct what use shall be made of the water supplied by the company. That is a function alone within the power of the municipal government.<sup>44</sup> A city is entitled to compensation from a water company for use of the city's pipes used by the company in furnishing water supply running through them, in part, to an adjoining borough.<sup>45</sup> A water company, under contract to supply a town and its inhabitants with water for extinguishing fires, is responsible to a property owner suing in his own name, for his loss suffered

Leavenworth Water Works Co. (Kan. 1904), 76 Pac. 451.

<sup>39</sup> Louisville Water Co. v. Wiemer (Ky. 1904), 130 Fed. 257 (U. S. C. C. A.).

<sup>40</sup> New Albany, etc. v. Louisville, etc. Co. (Ind. 1903), 122 Fed. 776 (U. S. C. C. A.).

<sup>41</sup> City of Helena v. Helena Water, etc. Co. (Mont. 1903), 122 Fed. 1 (U. S. C. C. A.).

<sup>42</sup> Rochester, etc. v. City of Rochester (1903), 82 N. Y. S. 455.

<sup>43</sup> Columbia, etc. Co. v. City of Dawson (Ga. 1903), 130 Fed. 152 (U. S. C. C. A.); Mercantile Trust Co. v. Columbus, etc. Co. (Ga. 1903), 130 Fed. 186 (U. S. C. C. A.).

<sup>44</sup> Wiemer v. Louisville, etc. Co. (Ky. 1903), 130 Fed. 251 (U. S. C. C. A.).

<sup>45</sup> Burrough of East Newark v. New York, etc. Co. (N. J. Ch. 1904), 57 Atl. 1051.

by failure of the company to furnish such supply.<sup>46</sup> A lease by the owner of premises on the shores of a pond, to be used for a dwelling and other uses for the ice business, with right to cut and take ice from the pond, constitutes such right an easement in the premises so leased.<sup>47</sup>

**§ 1114. Right of way for its pipes through private lands.—** A waterworks company, when authorized to exercise the right of eminent domain, may condemn right-of-way for laying its pipes across private lands, instead of in the public highway.<sup>48</sup> It may cross a canal of a canal company.<sup>49</sup>

**§ 1115. A municipality may establish its own waterworks.—** A city may be authorized to condemn a water company's plant,<sup>50</sup> and may condemn exclusive rights granted to a water company.<sup>51</sup> A village may build its own waterworks, although other waterworks have already been established in the village.<sup>52</sup> A city under charter power may build its own waterworks.<sup>53</sup> A city authorized to build waterworks of its own or to contract with a water company to establish works, is precluded from constructing its own, by such contract with a water company.<sup>54</sup> Authority to construct waterworks does not include authority to purchase works already constructed.<sup>55</sup> If a city contracts with a water company to supply water to the city for a period, and in the meanwhile breaks its contract, and erects its own waterworks, it is liable in full damages to the company.<sup>56</sup> Where the amount of debt a city may incur is limited, water bonds for waterworks issued in excess of the limit already reached are void.<sup>57</sup> A city may contract for water for a long series of years.<sup>58</sup>

<sup>46</sup> *Jones v. Durham, etc. Co.* (N. C. 1904), 47 S. E. 615.

<sup>47</sup> *Walker, etc. Co. v. American, etc. Co.* (Mass. 1904), 70 N. E. 937.

<sup>48</sup> *Biddle v. Wayne, etc. Co.* (1899), 190 Pa. St. 94.

<sup>49</sup> *Lehigh Valley R. R. v. Orange, etc. Co.* (1887), 42 N. J. Eq. 205.

<sup>50</sup> *In re City of Brooklyn* (1894), 143 N. Y. 596, 166 U. S. 685; *Kennebec v. City of Waterville* (Me. 1902), 52 Atl. 774.

<sup>51</sup> *Long Island, etc. Co. v. Brooklyn* (1897), 166 U. S. 685.

<sup>52</sup> *Colby University v. Canandaigua* (1895), 69 Fed. Rep. 671; *Skaneateles, etc. Co. v. Village of*

*Skaneateles* (1899), 161 N. Y. 154, 46 L. R. A. 687.

<sup>53</sup> *Thomas v. City, etc.* (1899), 13 Colo. App. 80, 56 Pac. 665.

<sup>54</sup> *Troy Water Co. v. Borough of Troy* (1901), 200 Pa. St. 453; *Walla Walla City v. Walla Walla Water Co.* (1898), 172 U. S. 1.

<sup>55</sup> *City of Austin v. McCall* (Tex. 1902), 68 S. W. Rep. 791.

<sup>56</sup> *Bennett Water Co. v. Burgess, etc.* (1902), 202 Pa. St. 616.

<sup>57</sup> *Nesbit v. Riverside, etc.*, 144 U. S. 610.

<sup>58</sup> *Cunningham v. City of Cleveland* (1899), 98 Fed. Rep. 657; *Reed v. City of Anoka* (1902), 85 Minn. 294.

§ 1116. When it may exact payment in advance; shut off water upon non-payment of bills.—The company may exact payment in advance, and if it is not made, may shut off the water,<sup>59</sup> or the company may shut off the water for violation of its regulations.<sup>60</sup> Where it has accepted payment for later bills, it may not shut off the water because of non-payment of earlier bills.<sup>61</sup> Where the company has not furnished a sufficiency of water, it has no right to shut off the water for non-payment of its bills.<sup>62</sup> The franchise of laying pipes through city streets and selling water to the inhabitants thereof being in the nature of a public use, or natural monopoly, carries with it the duty to supply water to all impartially and at reasonable rates.<sup>63</sup> Accordingly, a water company can not shut off the supply from any inhabitant without reasonable cause.<sup>64</sup> And an injunction may be issued to prevent it from cutting off its water supply,—where the consumer has offered to pay in advance the proper amount for the use of the water during the year, and the company claims a higher rate than is truly due and exigible.<sup>65</sup> The regulation of water rates is frequently committed to municipal boards of supervisors; and generally when the board of supervisors have fairly investigated and exercised their discretion in fixing the rates, the courts have no right to interfere on the sole ground that in the judgment of the court the rates thus fixed and determined are not reasonable.<sup>66</sup> But where these boards have arbitrarily, without investigation, and without any exercise of judgment or discretion, fixed these rates without any reference to what they should be, without ref-

<sup>59</sup> Hieronymous v. Bienville, etc. Co. (1901), 131 Ala. 447, 31 South. 31.

<sup>60</sup> Shiras v. Ewing (1892), 48 Kan. 170, 29 Pac. 320.

<sup>61</sup> Wood v. Auburn (1895), 87 Me. 287, 29 L. R. A. 376.

<sup>62</sup> McEntee v. Kingston, etc. Co. (1900), 165 N. Y. 27.

<sup>63</sup> Water-Works v. Schottler, 110 U. S. 347, where Chief Justice Waite, who delivered the opinion in Munn v. Illinois, said: "That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was

decided on full consideration in Munn v. Illinois, 94 U. S. 113." See, also, Water Works v. Bryant, 52 Cal. 132; Water Works v. City and County of San Francisco, 52 Cal. 111; Water Works v. Bartlett, 63 Cal. 245.

<sup>64</sup> McCrary v. Beaudry, 67 Cal. 120.

<sup>65</sup> Ernst v. New Orleans Water-Works Co. (1887), 35 La. Ann. 550, 2 So. Rep. 415; Stewart v. New Orleans Water Works Co. (La. 1887), 2 So. Rep. 416.

<sup>66</sup> Nesbitt v. Board, L. R. 10 Q. B. 463; Davis v. Mayor, 1 Duer, 451, 497; Water Works v. Schottler, 110 U. S. 347. Cf. Railway Co. v. Dey, 35 Fed. Rep. 866.

erence either to the expense necessary to furnish the water or to what is a fair and reasonable compensation therefor, so as to render it impossible to furnish water without loss, and so low as to amount to practical confiscation of the property invested in the business, it is within the jurisdiction of a court of equity to set aside their ordinance and direct the board to fix such rates as the constitution provided for.<sup>67</sup> The fact that there may be one price for the consumer who has a meter, and a different price for one who has none, does not render the ordinance uncertain. The requirement that the party furnishing the water shall provide the means necessary for its measurement, so that the quantity furnished and to be paid for may be known, is not an unreasonable regulation. The expense of the meter could not be imposed on the consumer.<sup>68</sup> It may not shut off supply to the city because of differences with the city as to payments of bills.<sup>69</sup> A city is not justified in cutting off a citizen's water supply by the fact that he drained the supply into the street, thereby creating a nuisance.<sup>70</sup> The charter of the municipality of Greater New York provides that the rules for use of Croton Water printed on each permit, shall impose penalties for violation in addition to that of cutting off the use of the water.<sup>71</sup> A water company will be enjoined from cutting off water supply of a customer on the ground of his tampering with the meter, and failing to pay the water rent due, the testimony failing to show the amount of water used.<sup>72</sup> Water-rates are not taxes, but merely the price paid for water. The relation between the city supplying it, and the consumer, is that of contract. The fact that by the use of water meters adopted in place of the flat rate system, the consumer was required to pay more per month, is not evidence of discrimination between consumers, or that the water rates by meter were unreasonable.<sup>73</sup>

**§ 1117. Regulation of water rates. Sale of works. Taxation, etc.—**The rates charged for water supply may, if excessive, be reasonably reduced by the State, or under its authority,

<sup>67</sup> Spring Valley Water Works v. City and County of San Francisco (Cal. 1890), 7 Ry. & Corp. L. J. 208.

<sup>68</sup> Spring Valley Water Works v. City and County of San Francisco (Cal. 1890), 7 Ry. & Corp. L. J. 208, citing to this point Steamship Co. v. Jersey City, 45 N. J. 246.

<sup>69</sup> Bienville, etc. Co. v. Mobile (1896), 112 Ala. 200.

<sup>70</sup> City of Van Alstyne v. Morrison (Tex. 1903), 77 S. W. 655.

<sup>71</sup> People v. Monroe (1903), 83 N. Y. S. 995.

<sup>72</sup> Healy v. City of New York (1903), 83 N. Y. 574.

<sup>73</sup> Powell v. City of Duluth (Minn. 1903), 97 N. W. 450.

by the city.<sup>74</sup> If a city owns waterworks it can not sell them without express legislative authority.<sup>75</sup> A waterworks plant is not subject to levy under execution. The creditor's remedy is alone in equity.<sup>76</sup> The works and mains of a waterworks company are taxable as real estate.<sup>77</sup> Where one purchases the waterworks plant and another the land containing the pipes connected with the plant, they go with it as personal property and not with the land.<sup>78</sup> A contract between a city and a water company to use the streets for its mains and pipes, is a franchise which may be forfeited for failure to supply water as provided in the contract.<sup>79</sup> For its failure to supply a citizen with water, *mandamus* will lie.<sup>80</sup> The company may be enjoined from charging an excessive or discriminating rate.<sup>81</sup>

**§ 1118. Powers and duties, etc.—**The franchise of a water company is taxable as part of its corporate property.<sup>82</sup> Agreement between a waterworks company and the authorities of a village for five years' supply of water, with provisions for purchase of the works, by the village, at the end of that time,—is held void for want of power, and not enforceable by or against the village.<sup>83</sup> Though corporations formed to furnish water to cities or towns are called, in the statutes, "private corporations," they are, nevertheless, *quasi-public* in their duties and are subject to legislative control.<sup>84</sup> Where a water company agrees to sell its waterworks plant to a city upon an option, and the city votes to purchase the plant and the waterworks franchise, the company can not thereafter forfeit the franchise, so as to deprive itself of the right to be paid for it as a part of the plant.<sup>85</sup>

<sup>74</sup> Freeport, etc. Co. v. Freeport City (1901), 180 U. S. 587; Rogers, etc. Co. v. Fergus (1901), 180 U. S. 624; Spring Valley Water Works v. Schottler (1884), 110 U. S. 347; Brymer v. Butler Water Co. (1897), 179 Pa. St. 331, 36 L. R. A. 260; San Diego Water Co. v. San Diego (1897), 118 Cal. 556, 38 L. R. A. 460; City of Danville v. Danville, etc. Co. (1899), 178 Ill. 299, 69 Am. St. Rep. 304.

<sup>75</sup> Huron Water Works Co. v. Huron (1895), 7 S. D. 9.

<sup>76</sup> National, etc. Works v. Oconto (1892), 52 Fed. Rep. 43.

<sup>77</sup> Paris v. Norway Water Co. (1893), 85 Me. 330, 21 L. R. A. 525.

<sup>78</sup> Dodge City, etc. Co. v. Alfalfa, etc. Co. (Kan. 1901), 61 Pac. Rep. 462.

<sup>79</sup> State v. Portage City, etc. Co. (1900), 107 Wis. 441.

<sup>80</sup> Haugen v. Albina, etc. Co. (1891), 21 Ore. 411, 28 Pac. 244, 14 L. R. A. 424.

<sup>81</sup> Griffin v. Goldsboro Water Co. (1898), 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240.

<sup>82</sup> Spring Valley, etc. Co. v. City and County of San Francisco (1903), 124 Fed. 574.

<sup>83</sup> *In re* Water Commissioners (1903), 176 N. Y. 239.

<sup>84</sup> Boise City, etc. v. Boise City (1903), 123 Fed. 232.

<sup>85</sup> Firm of Bristol v. Bristol,

## C.

## IRRIGATION COMPANIES.

**§ 1119. Irrigation companies Water rates. Water rights.** Appropriations by Congress for irrigation.—In the arid States and territories generally, provision is made by general statutes, for the incorporation of irrigation companies, and Congress recently made large appropriations for irrigation of the arid lands of the public domain. The legislature may authorize the organization of a municipal corporation to construct irrigation dams, ditches, and canals, with power to condemn lands and other property for its purposes, the costs to be defrayed by taxation.<sup>86</sup> The legislature may limit the rates to be charged,<sup>87</sup> or delegate to the municipality the power to regulate rates. The courts may determine the reasonableness of rates.<sup>88</sup> *Mandamus* is the appropriate remedy in case of failure of an irrigation company to supply water under its contract.<sup>89</sup> A mortgage by the company has priority over its written obligation, entitling the holder to use it in payment to the company for water rights. Claims for work and labor done in operating the plant have priority over a mortgage.<sup>90</sup> The company's property cannot be sold in execution. As in other *quasi-public* corporations, the creditor's remedy is in equity by the appointment of a receiver.<sup>91</sup> A purchaser of water rights from an irrigation company may enjoin it from arbitrarily destroying his headgates and ditches.<sup>92</sup> An order of court turning an irrigation canal over to a company for benefit of the owners of water rights without specifying who the owners are, includes the legal owners and not persons holding water rights sold beyond the capacity of the canal, which means its physical capacity to supply water, and the probability of obtaining it from the source of supply during the season of irrigation.<sup>93</sup>

etc. (1903), 35 Atl. 710, 25 R. I. 189.

<sup>86</sup> Fallbrook Irrigation Dist. v. Bradley (1896), 164 U. S. 112; Lake Koen, etc. Co. v. Klein (Kan. 1901), 65 Pac. Rep. 684.

<sup>87</sup> Lanning v. Osborne (1896), 76 Fed. Rep. 319.

<sup>88</sup> San Diego, etc. Co. v. National City (1896), 74 Fed. Rep. 79, 174 U. S. 739.

<sup>89</sup> People v. Farmers', etc. Co. (1898), 25 Colo. 202.

<sup>90</sup> Atlantic, etc. Co. v. Woodbridge, etc. Co. (1897), 79 Fed. Rep. 501.

<sup>91</sup> Sherman, etc. Co. v. Drake (Neb. 1902), 91 N. W. Rep. 512.

<sup>92</sup> Hargrave v. Hall (Ariz. 1903), 73 Pac. 400.

<sup>93</sup> Blakeley v. Fort Lyon Canal Co. (Colo. 1903), 73 Pac. 249; Public Guaranty, etc. v. Fort Lyon Canal Co. (Colo. 1903), 73 Pac. 249.

An irrigation corporation, authorized to divert water from its natural source for supply to landowners for purpose of irrigation, is a *quasi-public* corporation and must continue the service as long as it is required by the public.<sup>94</sup>

## D.

## FERRIES.

**§ 1120. Ferry companies. Landing on private property. Construction of bridge across its line. Exclusive privileges.—** A ferry engaged in the business for the public, and collecting tolls, requires a franchise from the legislature direct; or indirect, by grant of ferry privilege from a municipality.<sup>95</sup> Such a franchise does not authorize a landing upon the property of a private individual.<sup>96</sup> An exclusive ferry privilege may be granted where not prohibited by the constitution, but is now very rarely granted, and is always disfavored by the courts.<sup>97</sup> A ferry company may be authorized to condemn land for ferry purposes.<sup>98</sup> The company can convey its franchise only by deed, and not by contract.<sup>99</sup> A ferry franchise is real estate.<sup>1</sup> A free railroad ferry is violative of the rights of an antecedent exclusive ferry privilege.<sup>2</sup> A city cannot grant an exclusive ferry but in other respects the grant is valid.<sup>3</sup> The owner of a ferry franchise may enjoin the operation, without license, of a competing ferry.<sup>4</sup> An authorized toll bridge company may enjoin a ferry which is operated without authority.<sup>5</sup> A ferry company cannot enjoin the operation of a bridge across its course, after construction of the bridge.<sup>6</sup> Abandonment of its ferry or allowing it to get out of repair, and failure to erect and maintain a bridge, is ground for forfeiture of its franchise.<sup>7</sup> The

<sup>94</sup> Gould v. Maricopa Canal Co. (Ariz. 1904), 76 Pac. 598.

<sup>95</sup> Evans v. Hughes County (1893), 3 S. D. 580, 54 N. W. 603, 52 N. W. 1062.

<sup>96</sup> Pittsburgh, etc. R. R. v. Jones (1885), 111 Pa. St. 204, 56 Am. Rep. 260.

<sup>97</sup> Fanning v. Gregoire (1853), 16 How. 524; Johnson v. Crow (1878), 87 Pa. St. 184; Hudspeth v. Hall (1900), 111 Ga. 510, 36 S. E. 770; Williams v. Wingo (1900), 177 U. S. 601.

<sup>98</sup> Pool v. Simmons (1900), 134 Cal. 621.

<sup>99</sup> Gunterman v. People (1891), 138 Ill. 518.

<sup>1</sup> Mabury v. Louisville, etc. Co. (1894), 60 Fed. Rep. 645.

<sup>2</sup> Aiken v. Western R. R. (1859), 20 N. Y. 370.

<sup>3</sup> Carroll v. Campbell (1891), 108 Mo. 550.

<sup>4</sup> Green v. Ivey (Fla. 1903), 33 So. Rep. 711.

<sup>5</sup> Catawba, etc. Co. v. Flowers (1892), 110 N. C. 381, 14 S. E. 918.

<sup>6</sup> Riverton Ferry Co. v. McKeesport, etc. Co. (1897), 179 Pa. St. 466.

<sup>7</sup> State v. Council Bluffs, etc.

State of Ohio has the right to license a ferry from its side of the river, and to fix the charge for ferriage, across the Ohio river to West Virginia, though the rate is higher than that fixed by the law of West Virginia for ferriage over that river.<sup>8</sup>

## E.

## BRIDGES.

§ 1121. Bridge companies. Authority to charge tolls. Ferry company cannot enjoin. Failure to maintain bridge. Interstate bridges.—There is no common right to construct a bridge over a navigable stream, or to charge tolls for crossing it. The right can be acquired only by express grant from the sovereign power. Such a grant is therefore a franchise. The legislature may grant an exclusive privilege to a corporation to build such a bridge, and when granted it is entitled to protection under the constitution of the United States, as an irrevocable contract by the State.<sup>9</sup> Congress has exclusive jurisdiction of an interstate bridge over a navigable stream. Though incorporated by both States, neither one has authority to reduce the tolls the bridge charges.<sup>10</sup> A franchise for a toll bridge will not prevent the construction of a railroad bridge, constructed under exercise of the right of eminent domain.<sup>11</sup> Nor will the exclusive right to construct a bridge, be violated by grant of a ferry privilege.<sup>12</sup> Under the power of eminent domain a bridge owned by a corporation may be condemned.<sup>13</sup> Land owned by a bridge corporation, but not essential to its uses, may be condemned by a railroad corporation.<sup>14</sup> A bridge of a *quasi-public* corporation cannot be levied upon and sold under execution. But it may be placed in the charge of a receiver to collect its tolls and pay its debts.<sup>15</sup> A street railway com-

Co. (1881), 11 Neb. 354, 9 N. W. 563.

<sup>8</sup> State v. Faudre (W. Va. 1903), 46 S. E. 269.

<sup>9</sup> Cayuga Bridge Co. v. Magee (1830), 2 Paige, 116; The Binghamton Bridge Co. (1865), 3 Wall. 51.

<sup>10</sup> Covington, etc. Bridge Co. v. Kentucky (1894), 154 U. S. 204.

<sup>11</sup> Mohawk Bridge Co. v. Utica, etc. R. R. (1837), 6 Paige, 554; Bridge Proprietors v. Hoboken Co. (1863), 1 Wall. 116; Enfield

Toll Bridge Co. v. Hartford, etc. R. R. (1846), 17 Conn. 453, 42 Am. Dec. 716, 44 Am. Dec. 556.

<sup>12</sup> Parrott v. Lawrence (1872), 2 Dill. 332.

<sup>13</sup> West River Bridge Co. v. Dix (1847), 6 How. 507.

<sup>14</sup> Youghiogheny Bridge Co. v. Pittsburgh, etc. R. R. (1902), 201 Pa. St. 457.

<sup>15</sup> Overton Bridge Co. v. Means (1892), 33 Neb. 857, 29 Am. St. Rep. 514.

pany authorized to run over "any street or highway" may place its tracks upon, and run its cars over, a toll bridge, upon paying the proper tolls.<sup>16</sup> A bridge company has no power to sell the approaches to the bridge.<sup>17</sup>

## F.

### CANALS.

**§ 1122. Canal companies. Rights, duties and liabilities.**—A city can not compel an authorized canal corporation to build bridges at street intersections or to close its gates. The police power of the State in its control of a canal, must not be exercised simply for accommodation of the public or for benefit of individuals.<sup>18</sup> A canal company may contract with a coal company to adjust its freight rates to vary according to market prices of coal, and to quantities shipped.<sup>19</sup> Upon the dissolution of a canal corporation and sale of its property by a receiver, it does not revert to the original owners, but survives to the corporators upon payment of the lawful claims of creditors.<sup>20</sup> Even if the United States government owns all the stock of a canal corporation, it cannot reduce the tolls to a point where the rights of mortgagees are affected, except in violation of vested rights.<sup>21</sup> If the United States condemns a dam and lock of a canal company,<sup>22</sup> the measure of damages is not only their cost, but also the whole value of the franchise to charge, and collect tolls, and that depends upon the productiveness of the property.<sup>23</sup> A railroad corporation may be chartered to run along the line of an incorporated canal.<sup>24</sup> A canal can not be levied upon and sold in execution in the absence of express legislative authority.<sup>25</sup> If the canal bed be used as the road bed of a railroad, no compensation need be paid to abutting owners for right-of-way for the railroad.<sup>26</sup> In case of abandon-

<sup>16</sup> Pittsburgh, etc. Ry. v. Point Bridge Co. (1894), 165 Pa. St. 37, 26 L. R. A. 233.

<sup>17</sup> Pittsburgh, etc. Ry. v. Dodd (Ky. 1903), 72 S. W. Rep. 822.

<sup>18</sup> Platte, etc. Co. v. Dowell (1892), 17 Colo. 376, 30 Pac. 68.

<sup>19</sup> Commonwealth v. Delaware, etc. Canal (1862), 43 Pa. St. 295.

<sup>20</sup> Pennsylvania Coal Co. v. Delaware, etc. Co. (1863), 1 Keyes (N. Y.), 72.

<sup>21</sup> Bass v. Roanoke, etc. Co.

(1892), 111 N. C. 439, 19 L. R. A. 247.

<sup>22</sup> United States v. Louisville, Canal Co. (1873), 4 Dill. 601.

<sup>23</sup> Monongahela, etc. Co. v. United States (1893), 148 U. S. 312.

<sup>24</sup> Tuckahoe Canal Co. v. Tuckahoe R. R. Co. (1840), 11 Leigh. (Va.) 42, 36 Am. Dec. 374.

<sup>25</sup> Brady v. Johnson (1893), 73 Md. 445, 20 L. R. A. 737.

<sup>26</sup> Hatch v. Cincinnati, etc. R. R. (1866), 18 Ohio St. 92.

ment of the canal, and its use as a street, for twenty years, nevertheless the fee is owned by the company's grantee, and not by the abutting owners of property.<sup>27</sup> Where a canal company is authorized to charge tolls for passage of other transportation boats, it cannot collect toll upon a tug boat.<sup>28</sup> The purchaser of a canal is estopped by the purchase to raise the question whether the exercise of a franchise granted to the company, is *ultra vires*. The State alone can raise the question.<sup>29</sup>

## G.

## STEAMBOAT AND STEAMSHIP COMPANIES.

**§ 1123. Liability as common carriers to shippers and others.** As a common carrier, a steamship company cannot exact unreasonable rates. Where paid, they may be recovered back by the shipper.<sup>30</sup> Although in use by the boats of a steamship company, its private docks may be condemned for other purposes of the public.<sup>31</sup> A provision in a steamboat ticket, limiting its liability to a small sum, is void where no provision is made for increase of liability upon payment of increased rate.<sup>32</sup> Where the company deviates from the route stipulated in its bill of lading, it becomes an insurer against loss of the goods, even from unavoidable casualty.<sup>33</sup>

**§ 1124. Railroads cannot establish steamboat lines.**—Railroads cannot establish steamboat lines nor own steamboats to run in connection with their roads.<sup>34</sup> A note given by a railroad for a steamboat is not collectable.<sup>35</sup> A contract of a railroad for running a steamboat in connection with it is illegal.<sup>36</sup> But a railroad is liable upon its draft given for the purchase of a steamboat.<sup>37</sup> Two railroads may be connected by a ferry.<sup>38</sup> A company incorporated to mine and transport coal may purchase and use a steam-

<sup>27</sup> Decker v. Evansville, etc. Ry. (1893), 133 Ind. 493.

<sup>28</sup> Sturgeon Bay, etc. Co. v. Leatham (1896), 164 Ill. 239.

<sup>29</sup> New York, etc. Co. v. Consolidated, etc. Co. (1904), 178 N. Y. 167.

<sup>30</sup> Johnson v. Pensacola (1878), 16 Fla. 623, 26 Am. Rep. 731, 18 L. R. A. 221; Cowden v. Pacific, etc. Co. (1892), 94 Cal. 470.

<sup>31</sup> The Diamond, etc. v. Davenport, etc. (1901), 115 Iowa, 480.

<sup>32</sup> The Kensington (1902), 183 U. S. 263.

<sup>33</sup> Robertson v. National Steamship Co. (1893), 139 N. Y. 416.

<sup>34</sup> Gunn v. Central R. R. (1885), 74 Ga. 509; Leslie v. Lorillard (1888), 110 N. Y. 519.

<sup>35</sup> Pearce v. Madison (1858), 21 How. 441.

<sup>36</sup> St. Joseph v. Saville (1867), 39 Mo. 460.

<sup>37</sup> Parish v. Wheeler (1860), 22 N. Y. 494.

<sup>38</sup> Baltimore v. Baltimore, etc. R. R. (1863), 21 Md. 50.

boat for such transportation.<sup>39</sup> A railroad authorized by its charter to contract for delivery beyond its line, may purchase and run a steamboat for transfer of its railroad passengers to another line.<sup>40</sup>

## H.

### WHARF, OR DOCK, OR PIER.

**§ 1125. Public wharf, or dock, or pier companies.**—Upon payment of reasonable compensation, a steamship company may use the wharf of a railroad company, although used by its own steamboats.<sup>41</sup> Although a city has condemned and taken a wharf, under its authorized power of eminent domain, it has no power to lease it for any other than a public or *quasi*-public use. This was the case of lease of the wharf to a refinery of sugar.<sup>42</sup> If the company's docks are open to use by the general public, no discrimination in accommodation can be made as to persons; and the rates charged, if unreasonable, are subject to reduction by the legislature or by the city under legislative authority.<sup>43</sup> A wharf or pier may be condemned by a railway company.<sup>44</sup>

## I.

### GRAIN ELEVATOR.

**§ 1126. Public grain elevator companies.**—Where it is not shown that there is adequate remedy at law, injunction may issue against an elevator corporation which uses all its capacity for the exclusive benefit of its stockholders.<sup>45</sup> The legislature may regulate its charges.<sup>46</sup> But its rates can not be reduced by the legislature, to a figure so low as to be unreasonable.<sup>47</sup>

## J.

### GRIST MILLS.

**§ 1127. Public grist mill.**—A state may regulate the charges of a grist mill, which serves the general public, and collects toll.<sup>48</sup>

<sup>39</sup> Callaway, etc. Co. v. Clark (1862), 32 Mo. 305.

<sup>40</sup> Shawmut Bank v. Pittsburgh, etc. R. R. (1859), 31 Vt. 491.

<sup>41</sup> Oregon Short Line, etc. Ry. v. Ilwaco, etc. Co. 51 Fed. Rep. 611.

<sup>42</sup> Belcher, etc. Co. v. St. Louis, etc. Co. (1884), 82 Mo. 121.

<sup>43</sup> Indian River, etc. Co. v. East Coast, etc. Co. (1891), 28 Fla. 387, 29 Am. St. Rep. 258; Transporta-

tion Co. v. Parkersburg (1882), 107 U. S. 691.

R. (1879), 77 N. Y. 248.

<sup>44</sup> *Re* New York Central, etc. R.

<sup>45</sup> Central Elevator Co. v. People (1898), 174 Ill. 203.

<sup>46</sup> Brass v. North Dakota (1894), 134 U. S. 418.

<sup>47</sup> Budd v. New York (1892), 143 U. S. 517.

<sup>48</sup> State v. Edwards (1893), 86 Me. 102.

## K.

## STOCKYARDS.

**§ 1128. Public stockyards.**—A stockyard is not a *quasi-public* corporation until the legislature imposes public duties upon it. A court of equity cannot restrain its giving preference in rates.<sup>49</sup> A statute regulating the rates of a particular stockyards company is unconstitutional, in being a denial to the company of equal protection of the laws.<sup>50</sup>

## L.

## SLEEPING CAR COMPANIES.

**§ 1129. Sleeping and parlor car companies.**—Agreement by a railroad company to use exclusively the cars of a sleeping car company is not contrary to public policy.<sup>51</sup> It was held not liable as a common carrier for refusal of its agent to furnish berths.<sup>52</sup>

## M.

## BOOM COMPANY, OIL MINING.

**§ 1130. Boom company serving the public.**—The legislature may regulate the charges which may be made by a boom company serving the public.<sup>53</sup>

**§ 1130a. Oil mining corporation.**—It is not *ultra vires* for an oil-mining corporation, unable to further and prosecute its corporate purposes, to lease its lands to others for the purpose of oil-mining, reserving to the lessor company a royalty upon the product.<sup>54</sup>

## N.

## TURNPIKES AND PLANKROADS.

**§ 1131. Turnpike and plankroad companies cannot run stage lines. May operate highway as a toll road. Removal of toll-gate. Use of right-of-way by street railway. Purchase by counties.**—A turnpike or plankroad company may not engage in any other business than that for which it was incorporated. It

<sup>49</sup> Delaware, etc. R. R. v. Central, etc. Co. (1889), 45 N. J. Eq. 50.

<sup>50</sup> Cotting v. Kansas City, etc. Co. (1901), 183 U. S. 79.

<sup>51</sup> Chicago, etc. R. R. v. Pullman, etc. Co. (1891), 139 U. S. 79.

<sup>52</sup> Lemon v. Pullman, etc. Co. (1892), 52 Fed. Rep. 262.

<sup>53</sup> Underwood Lumber Co. v. Pelican Boom Co. (1890), 76 Wis. 76.

<sup>54</sup> Stark v. Guffy Petroleum Co. (Tex. Civ. App. 1904), 80 S. W. 1080.

cannot purchase teams and vehicles and engage in carrying passengers or freight for hire, even over its own road.<sup>55</sup> It can not construct or maintain a road between other points, or along a different route than that described in its articles of incorporation.<sup>56</sup> Once located as a toll road, it cannot be changed to any other route.<sup>57</sup> It may be authorized to take possession of a highway and operate it as a toll road.<sup>58</sup> A turnpike road is a public highway. Its only authority for collection of toll is that conferred by its charter.<sup>59</sup> It may exact toll for a bicycle, as for a two wheeled vehicle.<sup>60</sup> Where the right to take tolls was conferred upon the company by charter, a statute ordering removal of its toll-gates is unconstitutional, although since their establishment a town has grown up around them.<sup>61</sup> The only power to remove the toll gates, is in exercise of the right of eminent domain.<sup>62</sup> Under this power a turnpike may be taken for another public highway, or *quasi-public* corporation.<sup>63</sup> A town may condemn for a highway, a turnpike and part of an interstate bridge which is in the State.<sup>64</sup> The rates of toll may be reduced by the legislature, upon power of reduction reserved in the charter.<sup>65</sup> The charter may be forfeited for failure to keep the road in repair.<sup>66</sup> Upon the forfeiture or abandonment of a turnpike, it becomes a public highway.<sup>67</sup> The franchise of a turnpike cannot be levied upon and sold under execution.<sup>68</sup> The grant of a turnpike and ferry privilege does not preclude a subsequent grant of another turnpike and bridge, however ruinous to the former grant.<sup>69</sup> A street railway can be constructed upon a

<sup>55</sup> Downing v. Mt. Washington Road Co., 40 N. H. 230.

<sup>56</sup> Stevens v. Rutland, 29 Vt. 545.

<sup>57</sup> Snell v. Chicago (1890), 133 Ill. 413, 8 L. R. A. 858.

<sup>58</sup> Carter v. Meuli (1898), 122 Cal. 367.

<sup>59</sup> Covington, etc. Co. v. Sandford (1896), 164 U. S. 578.

<sup>60</sup> Gerger v. Perkiomen, etc. R. R. (1895), 167 Pa. St. 582; String v. Camden, etc. Co. (1898), 57 N. J. Eq. 227; Rochester, etc. Co. v. Joel (1899), 41 N. Y. App. Div. 43.

<sup>61</sup> Attorney-General v. Germantown, etc. Road (1866), 55 Pa. St. 466; Fort Wayne, etc. Co. v. Maumee, etc. Co. (1892), 132 Ind. 880;

Turnpike Co. v. Davidson County (1877), 3 Tenn. Ch. 396.

<sup>62</sup> Detroit v. Detroit, etc. Co. (1880), 43 Mich. 140, 5 N. W. 275.

<sup>63</sup> Armington v. Barnet (1843), 15 Vt. 745, 40 Am. Dec. 705.

<sup>64</sup> Crosby v. Hanover (1858), 36 N. H. 404.

<sup>65</sup> Winchester, etc. Co. v. Croxton (1896), 98 Ky. 739, 33 L. R. A. 177.

<sup>66</sup> People v. Detroit, etc. Co. (Mich. 1902), 90 N. W. Rep. 687.

<sup>67</sup> Pontiac, etc. v. Cobb (1895), 104 Mich. 395.

<sup>68</sup> State v. Turnpike Co. (N. J. 1900), 46 Atl. Rep. 509.

<sup>69</sup> Hydes, etc. Co. v. Davidson Co. (1892), 91 Tenn. 291, 18 S. W. 626.

turnpike only by consent of the stockholders or owners and of the municipal officers,<sup>70</sup> or under exercise of the right of eminent domain.<sup>71</sup>

*Purchase by counties.*—Under statute providing that upon sale of a turnpike to the county its charter and franchise is ended,—a lease of the turnpike to the county until the company should obtain sufficient funds to complete it, did not terminate the charter and franchise.<sup>72</sup> Where the statute made abandonment of a turnpike by failure for four months to charge toll, and the company turned over its road to the county upon contract of purchase, which was not completed in four months, *held* not to be abandonment.<sup>73</sup> In an action by the company against the county for recovery of the purchase price, and the turnpike having cost over two hundred thousand dollars, instructions to the jury to find that the road was of no value, were held to be erroneous.<sup>74</sup>

## O.

### BANKS, SAVINGS BANKS, NATIONAL BANKS.

**§ 1132. A bank can do no other business. Deposits made in bank after its insolvency. Transfer of business to a trust company. State cannot prohibit private banking. Powers of bank cashiers. Savings banks.**—A banking corporation is one authorized to receive deposits of money, to lend money, and discount negotiable paper. The term includes savings banks.<sup>75</sup> The State in the exercise of its police power, may regulate the business of savings and other banks and insurance companies, by reasonable requirements as to the investment of their funds,<sup>76</sup> and may require regular statements of their financial condition to be made to some public officer, and may impose a penalty upon such corporations, or their officers for non-compliance with the law.<sup>77</sup>

*Legislative regulation of banks.*—The legislative authority may subject the business of public banking to supervision and scrutiny

<sup>70</sup> Steelton v. East Harrisburg Pass. Ry. (1892), 1 Pa. Dist. 667.

<sup>71</sup> Boston, etc. R. R. v. Salem, etc. R. R. (1854), 68 Mass. 1.

<sup>72</sup> Maysville, etc. Co., (1903) 77 S. W. 1118, 25 Ky. Law Rep. 1404.

<sup>73</sup> Bardstown, etc. Co. v. Nelson County (Ky. 1904), 78 S. W. 851.

<sup>74</sup> Bardstown, etc. Co. v. Nelson

County (Ky. 1904), 78 S. W. 851.

<sup>75</sup> *Vide supra*, § 26; Pratt v. Short, 79 N. Y. 437, 35 Am. Rep. 531.

<sup>76</sup> Answer of Justices, 9 Cush. (Mass.) 604.

<sup>77</sup> Chicago Life Ins. Co. v. Needles, 118 U. S. 574; Eagle Ins. Co. v. Ohio, 153 U. S. 446.

as rigid as that exercised by the federal government over national banks. A Wisconsin statute prohibits the use of the words "bank," "banking," "banker," or "savings bank," by any institution as part of its name, when not incorporated under State or national law. An act of North Dakota, of 1890, practically prohibits private banking in that State, as it requires all banks in the State to be incorporated under State or national law. In Indiana a private bank must have a prescribed amount of paid up capital, and must at stated periods each year make sworn reports to the State bank examiner and submit to his examination at any time, as in case of national banks. In most States, however, there is no statutory restraint upon the financial operations of the "banker" to open an office, as "bank," and by signs and advertisements, however imposing and attractive, allure and take the money of trustful depositors without any guaranty for its return, or protection whatever by state or federal legislative provision.

*Liability of directors and other officers to depositors.*—The receiver or assignee of a bank or insurance company or other corporation,—by a bill in equity, or an action at law, may enforce the liability of directors or other officers for conversion or misapplication of the corporate assets, or for their loss by reason of culpable negligence or mismanagement.<sup>78</sup> The State cannot prohibit private banking.<sup>79</sup> A director is liable personally for deposits made in the bank after his knowledge that it is insolvent.<sup>80</sup> A depositor in a savings bank may, in equity, restrain its dissolution where it is intended to transfer the business to a trust company.<sup>81</sup> A corporation organized for banking only, has no power to engage in any business not incidental to banking.<sup>82</sup> A bank, like other private corporations, is confined to the sphere of action limited by the terms and intention of the charter.<sup>83</sup> It is not, there-

<sup>78</sup> Union Nat. Bank v. Hill, 148 Mo. 380, 71 Am. St. Rep. 615.

<sup>79</sup> State v. Scougal (1892), 3 S. D. 55, 15 L. R. A. 477, 44 Am. St. Rep. 756.

<sup>80</sup> Cassidy v. Uhlmann (1902), 170 N. Y. 595.

<sup>81</sup> Barrett v. Bloomfield Sav. Ins. (N. J. 1903) 54 Atl. Rep. 543.

<sup>82</sup> Jemison v. Citizens' Sav. Bank, 122 N. Y. 135, 9 L. R. A. 708.

<sup>83</sup> Bank of Michigan v. Niles Walk. (Mich.) 99; Jemison v.

Citizens' Sav. Bank, etc. 122 N. Y. 135, 19 Am. St. Rep. 482, 9 L. R. A. 708; Weckler v. First Nat. Bank of Hagerstown (1875), 42 Md. 581, 14 Am. Law Reg. 609, approving Bank of the United States v. Dandridge, 12 Wheat. 68, where it is said: "Whatever may be the implied powers of aggregate corporations by the common law, and the modes by which those powers are to be carried into operation, corporations created by statute must depend, for

fore, within the scope of the powers of national banks to carry on the business of selling bonds on commission.<sup>84</sup> It is not in any wise necessary to the purpose of their existence, or in any sense incidental to the business they are empowered to conduct, that they should become bond brokers, or be allowed to traffic in every species of obligations issued by the innumerable corporations, private and municipal, of the country.<sup>85</sup> Nor has an insurance company, or other corporation not created for banking, any authority to engage in banking business.<sup>86</sup> The authority merely to buy and sell and deal in negotiable paper does not include authority to engage in the business of banking.<sup>87</sup>

*Cashiers.*—The cashier of any other than a banking corporation has no power, unless it be expressly given, to bind the company by any contract,<sup>88</sup> but it is different in the case of a banking corpora-

theirs and the mode of exercising them, upon the true construction of the statute itself." The law more at large is stated in the principal case to be in Maryland, that a corporation created for a specific purpose not only can make no contract forbidden by its charter, but in general can make no contract which is not necessary either directly or indirectly to enable it to answer that purpose. In deciding, therefore, whether a corporation can make a particular contract, it must be considered, in the first place, whether its charter or some statute binding upon it forbids or permits it to make such a contract; and if its charter and the statutory law are silent upon the subject, in the second place, whether the power to make such a contract may not be implied upon the part of the corporation as directly or incidentally necessary to enable it to fulfill the purpose of its existence; or whether the contract is entirely foreign to its purpose. A corporation has no other powers than such as are specifically granted or such as are necessary for the purpose of carrying into effect the powers expressly granted. *Pennsylvania, etc. Co. v. Dandridge*, 8 Gill & J. 318.

<sup>84</sup> *Weckler v. First Nat. Bank of Hagerstown* (1875), 42 Md. 581, 20 Am. Rep. 95, 14 Am. Law Reg. 609, citing *Talmadge v. Pell*, 7 N. Y. 328; *Fowler v. Scully*, 72 Pa. St. 456; *Shrickle v. First Nat. Bank of Ripley*, 22 Ohio St. 516; *Wiley v. First Nat. Bank of Brattleboro* (1875), 47 Vt. 456, 14 Am. Law Reg. 342; *First Nat. Bank of Lyons v. Ocean Nat. Bank* (1875), 60 N. Y. 278.

<sup>85</sup> *Weckler v. First Nat. Bank of Hagerstown* (1875), 42 Md. 581, 20 Am. Rep. 95; *First Nat. Bank, etc. v. Hock*, 89 Pa. St. 324, 33 Am. Rep. 709, 14 Am. Law Reg. 609. The judge goes on to say that the more carefully they confine themselves to the legitimate business of banking, as defined in the law, the more effectually they will subserve the purposes of their creation. By a strict adherence to that they will best accommodate the commercial community, as well as protect their stockholders.

<sup>86</sup> *People v. River Raisin, etc. Co.*, 112 Mich. 389, 86 Am. Dec. 64.

<sup>87</sup> *Blair v. Perpetual Ins. Co.*, 10 Mo. 559, 47 Am. Dec. 129; *Sumner v. Marcyn*, 3 Woodb. & M. 112, Fed. Cas. No. 13,609; *State v. Granville, etc. Soc.*, 11 Ohio, 1.

<sup>88</sup> *Delta Lumber Co. v. Williams*, 73 Mich. 86.

tion. There the general management of the ordinary business is in charge of the cashier. Tellers and other subordinate officers are under his direction, wherefore he has, as chief executive officer, implied authority to buy and sell securities, borrow money, pledge the assets, incur debts and make other contracts within the scope of the ordinary business of the bank.<sup>89</sup> Nevertheless his implied power and authority are restricted to the usual business of the bank, and does not extend to any extraordinary transactions. As to them, his authority must be expressly conferred by the board of directors.<sup>90</sup>

**§ 1133. National banks.**—As to the jurisdiction of the federal courts of suits by and against national banks, they are, by acts of Congress, regarded as citizens or residents of the State in which they are established;<sup>91</sup>—except in cases commenced by the United States, or in cases for winding up the affairs of the bank.<sup>92</sup> Without any other authority, a bank existing under the laws of a State may reorganize as a national banking association under the acts of Congress.<sup>93</sup> The identity of the corporation is not changed, but it merely continues under a different jurisdiction.<sup>94</sup> It derives its franchises and privileges from the federal government.<sup>95</sup> It has been decided that national banks have no power to bind themselves or the corporators, by accepting bonds, coin, or other valuable things, upon special deposit, for safe keeping and return on demand, and no recovery can be had against the bank for any such deposit left with the cashier and not returned on request.<sup>96</sup> But a banking company, it was recently decided in England, could make payment of an annuity to the family of a deceased superintendent, for, it was said, that the act was conducive to the interests of the company.<sup>97</sup>

*Taxation of National banks.* *Vide supra*, §§ 526a, 526b.

<sup>89</sup> Ryan v. Dunlop, 17 Ill. 40, 63 Am. Dec. 334; Sturges v. Bank of Circleville, 11 Ohio St. 153, 78 Am. Dec. 296.

<sup>90</sup> Lloyd v. West Branch Bank, 15 Pa. St. 172, 53 Am. Dec. 581.

<sup>91</sup> St. Louis Nat. Bank v. Allen, 5 Fed. 551.

<sup>92</sup> Union Nat. Bank of Cincinnati v. Miller, 15 Fed. 703.

<sup>93</sup> Revised Statutes U. S., § 5154; Act of June 30, 1876; Keyser v.

Hitz, 133 U. S. 138; Thomas v. Farmers' Bank of Md., 46 Md. 43.

<sup>94</sup> Michigan Ins. Bank v. Eldred, 143 U. S. 293.

<sup>95</sup> State v. National Bank of Missouri, 46 Mo. 140.

<sup>96</sup> Wiley v. First Nat. Bank of Brattleboro (1875), 47 Vt. 456, 14 Am. L. Reg. 342, distinguishing Foster v. Essex Bank, 17 Mass. 497.

<sup>97</sup> Henderson v. Bank of Australasia (1888), 40 Ch. Div. 170, 4 Ry. & Corp. L. J. 214.

## P.

## TRUST COMPANIES.

§ 1134. Trust companies.—Trust companies exercise some of the powers of banking corporations, but are distinguished from them in that the deposits of trust companies are not subject to check. They cannot issue their notes for circulation, or buy or sell exchange in their usual course of business. They may engage in real estate business, trusteeships, and other transactions not within the powers of a banking corporation.<sup>98</sup> A charter to a trust company, with banking privileges, is authorized where such trust companies are embraced within the description of banking companies, as used in the constitution.<sup>99</sup>

## Q.

## INSURANCE COMPANIES.

§ 1135. Insurance companies. Under same control as banks. Reports to the state. Profits go to the stockholders and not to policy holders. Limited to authorized line of insurance. Surety insurance companies. Title guaranty companies.—It is within the police power of the legislature to control the business of insurance companies, as of banks and other moneyed corporations, for protection of policy holders, especially by regulations as to the investment of their funds and deposits.<sup>1</sup> To this end, the legislature may require at stated periods sworn statements by the officers, of the financial condition of insurance companies, the general public being interested in their solvency.<sup>2</sup> Where a court finds that the continuance of an insurance company's business will be hazardous to the public, forfeiture of its charter may be decreed.<sup>3</sup> Statutory regulations of the States generally, are very stringent in the case of foreign insurance companies doing business in the State. They must conform to such regulations.<sup>4</sup> The business of an insurance company must be limited strictly to the purposes set out in its charter, or articles of incorporation. A life insurance

<sup>98</sup> State v. Reid, 125 Mo. 43.

<sup>2</sup> State v. Stone (1893), 118 Mo.

<sup>99</sup> Mulherin v. Kennedy (Ga.

388, 25 L. R. A. 243.

1904), 48 S. E. 437. *Vide supra*,

<sup>3</sup> Chicago Life Ins. Co. v. Auditor (1881), 101 Ill. 82.

TRUST COMPANIES, § 27.  
<sup>1</sup> Eagle Ins. Co. v. Ohio (1894),  
153 U. S. 446.

<sup>4</sup> Daly v. National, etc. Ins. Co.  
(1878), 64 Ind. 1.

company cannot engage in marine insurance. A company restricted to insurance on buildings and contents, cannot insure growing grain against damage by hail.<sup>5</sup> A fire insurance company cannot insure against losses caused by lightning.<sup>6</sup> The holder of a policy in a mutual insurance company may enjoin the officers from changing it to a stock corporation.<sup>7</sup> One mutual life insurance company cannot sell out to another mutual life insurance company, in transfer of membership and property.<sup>8</sup> The stockholders of an insurance company, whether on the stock or mutual plan, are entitled to the profits of the business, and not the policy holder.<sup>9</sup> An insurance company cannot invest in the stock of a bank,<sup>10</sup> nor in that of another insurance company.<sup>11</sup> A statute making an insurance agent personally liable upon contracts of insurance, relates to contracts made within the State, regardless of location of the property insured. The liability is statutory and not upon the policy.<sup>12</sup>

*Federal regulation of insurance companies.*—The business of insurance in this country has marvelously grown to involve the holding by single companies, as trustees for their policy-holders, of hundreds of millions of dollars, as developed in case of the Equitable Life Insurance Company of New York, which so holds over three hundred millions, belonging in trust to the company's half million policy-holders, dispersed the world over. Among multitudes of others, the president of such a company declares that the business has outgrown State supervision and demands regulation by the general government, and that at present "a company is subject to the incongruous and sometimes unreasonable laws of all the States in which it does business, and it may have forty-five separate insurance departments to deal with." Accordingly, he has introduced, and there is now pending, a bill to place such companies under control of the national government. The bill begins by declaring that "policies of insurance are hereby deemed to be articles of commerce and instrumentalities thereof," and it provides

<sup>5</sup> Delaware, etc. Ins. Co. v. Wagner (1894), 56 Minn. 240.

<sup>6</sup> Andrews v. Union, etc. Ins. Co. (1854), 37 Me. 256.

<sup>7</sup> Schwarzwaelder v. German, etc. Ins. Co. (1899), 59 N. J. Eq. 589.

<sup>8</sup> Temperance, etc. Assn. v. Home, etc. Soc. (1898), 187 Pa. St. 38.

<sup>9</sup> Traders,' etc. Ins. Co. v. Brown (1888), 142 Mass. 403.

<sup>10</sup> State v. Butler (1888), .86 Tenn. 614.

<sup>11</sup> Pierson v. McCurdy (1884), 33 Hun, 520.

<sup>12</sup> Adler Weinberger S. T. Co. v. Rothschild & Co. (1903), 123 Fed. 145.

for creation of a division of insurance of the Bureau of Corporations, and empowers it to grant to any corporation desiring to transact interstate or foreign commerce insurance, a license empowering it to do so. Such legislation will be acceptable to most, if not all, insurance companies, and policy-holders as well. They prefer national control to State supervision. It is held in *Paul v. Virginia* (1868), 8 Wall. U. S. 168, that insurance is not interstate commerce but Congress by affirmative action may subject it to federal regulation as such.

*Surety insurance companies.*<sup>13</sup>

§ 1135a. **Title guaranty companies.**—Such companies are now common. Their contracts are to indemnify another person against the failure of the title to land granted by a third person.<sup>14</sup>

R.

CEMETERIES.

§ 1136. **Public cemeteries.**—A cemetery is defined to be a place for burial of dead bodies of human beings. A cemetery corporation is a *quasi*-public corporation and cannot mortgage or alienate its lands without express legislative authority.<sup>15</sup> Where the cemetery is for public use, the company may take lands for its purpose, under the power of eminent domain.<sup>16</sup> The legislature may authorize the taking of land by a cemetery corporation for a public burial ground.<sup>17</sup> Though a cemetery association be incorporated, its charter does not confer incidental power to issue stock.<sup>18</sup> A cemetery corporation has no authority to insure any indebtedness based upon the dedication of land to the company for a cemetery, or to mortgage it.<sup>19</sup> In the exercise of its power the legislature may regulate the use, and continue or discontinue the use of a cemetery.<sup>20</sup> Under power delegated by the legislature to municipalities to protect the public health and welfare, they may regulate the manner of burial, and the depth of graves. They may pro-

<sup>13</sup> For the powers and privileges of surety companies, *vide* 48 L. R. A. 587.

<sup>14</sup> Minnesota Title, etc. Co. v. Drexel, 33 C. C. A. 50.

<sup>15</sup> *Woolford v. Crystal Lake Cem. Assn.* (1893), 54 Minn. 440.

<sup>16</sup> *In re Deansville Cemetery*, 66 N. Y. 569 (1876), 23 Am. Rep. 86.

<sup>17</sup> *Evergreen Cemetery Assn. v.*

New Haven, 43 Conn. 234, 21 Am. Rep. 643.

<sup>18</sup> *Cooke v. Marshall* (1900), 196 Pa. St. 200, 46 Atl. 447.

<sup>19</sup> *Oakland, etc. Co. v. People's Cemetery Assn.*, 93 Tex. 569; *Woolford v. Crystal, etc. Assn.*, 54 Minn. 440.

<sup>20</sup> *Scoville v McNamara*, 62 Conn. 378, 36 Am. St. Rep. 350.

hibit the continuance of burials in existing burial grounds, and cause the establishment of new cemeteries within the municipal limits.<sup>21</sup> The court will enjoin, as a nuisance, the location of a cemetery where it is shown that it would be dangerous to life or health, by corrupting the atmosphere or the waters of springs or wells.<sup>22</sup> Ownership of a lot in a public cemetery is not necessarily equivalent to membership in the corporation by which it is established.<sup>23</sup> A lot holder's right in a public cemetery ceases, except to remove remains there buried, whenever by lawful authority the grounds cease to be a place for burial.<sup>24</sup> Land will be deemed to be abandoned as a graveyard, when it has ceased to be used for that purpose, and it has become permanently appropriated to other and entirely different uses by the public and by those interested in its use for burial purposes.<sup>25</sup> The inclusion of cemeteries, in an enabling act for the incorporation of associations other than those for pecuniary profit, does not authorize incorporation of a cemetery association "as a scheme for private speculation."<sup>26</sup> The right of possession of a burial lot continues as long as the graves are distinguishable by marks, and so long as the cemetery continues to be used as such.<sup>27</sup>

<sup>21</sup> *People v. Pratt*, 129 N. Y. 68; *Campbell v. Kansas City*, 102 Mo. 326; *Austin v. Austin City, etc. Assn.*, 87 Tex. 330, 47 Am. St. Rep. 114; *Los Angeles Co. v. Hollywood Cemetery Assn.*, 124 Cal. 344. <sup>22</sup> *Clark v. Lawrence*, 59 N. C. 83, 78 Am. Dec. 241.

<sup>23</sup> *Commonwealth v. Union Bu-*

*rial, etc. Soc.*, 78 Pa. St. 308.

<sup>24</sup> *Rayner v. Nugent*, 60 Md. 515.

<sup>25</sup> *Campbell v. Kansas City*, 182 Mo. 326.

<sup>26</sup> *Brown v. Maplewood, etc. Assn.* (Minn. 1902), 89 N. W. 872.

<sup>27</sup> *Jacobus v. Congregation, etc.* (1904), 107 Ga. 518.

## CHAPTER XLVII.

### BONDS AND COUPONS.

§ 1137. Corporate bonds, form, seal, etc.	§ 1151. Coupons as negotiable instruments.
1138. Debentures.	1152. Formal requisites of negotiability of coupons.
1139. Power to borrow money and issue bonds.	1153. <i>Bona fide</i> purchaser of bonds and coupons.
1140. Power to guarantee the bonds and securities of other corporations.	1154. Lost or stolen bonds.
1141. Recitals, references, between bonds, coupons and mortgages.	1155. Income bonds.
1142. Registration of bonds.	1156. Alteration of numbers of bonds.
1143. Maturity of bonds.	1157. Bonds issued below par.
1144. Sinking fund for payment of bonds.	1158. Overissue of bonds.
1145. Negotiability of bonds and coupons.	1159. Priority of bonds and of liens.
1146. Essentials of negotiability.	1160. Respective rights of majority and minority bondholders.
1147. Limitations on negotiability.	1161. Bond dividend.
1148. Coupons.	1162. Bonds convertible into stocks.
1149. Coupons as instruments <i>sui generis</i> .	1163. Action upon coupons.
1150. Coupons likened to checks, etc.	1164. Taxation of bonds. Federal and state bonds not taxable.
	1165. Attachment levied on bonds by garnishment of the corporation.

#### *References:*

Power to borrow money, make and issue bonds, and guarantee bonds of other corporations. Powers. Sections 849-854.  
Mortgage. Sections 1166-1183.  
Foreclosure. Sections 1184-1204.  
Negotiability of stock and bonds. Section 272.  
Lost or stolen stock and bonds. Sections 272-274.  
Forgery of stock and bonds. Sections 281, 282.  
Taxation of corporate securities and loans. Section 506a.  
"Watered stock" and bonds. Sections 275-293.  
*Bona fide* purchaser of stock and bonds. Sections 273, 381, 395.  
Stock and bonds issued below par. Section 289.

**§ 1137. Corporate bonds, form, seal, etc.—Form of Bonds.**  
—Bonds may be written in any form having the essentials of negotiable paper, and made payable to bearer, or to blank payee.

In that case the holder may fill in his name, or if made payable to a named person he must assign it in writing, which may be to a blank payee. The holder and not the assignee is the payee.<sup>1</sup> The bond and the mortgage are parts of one instrument and are to be read together as such, and construed as one.<sup>2</sup> If there be any conflict of terms between them the bond controls.<sup>3</sup>

*Seal.*—The attached corporate seal may be treated as the signature of the corporation, giving the bond the effect only of a promissory note, or otherwise as making the bond a sealed instrument; in the latter case making it subject to the longer statute of limitations.\* The debt secured by a corporate mortgage is usually in the form of bonds, although not necessarily so.<sup>5</sup> Neither are bonds necessarily secured by mortgage. They may be wholly unsecured, or may constitute a lien without a mortgage.<sup>6</sup> Generally, there is nothing in the enabling acts which restricts the power of a corporation to issue bonds for a debt already in existence, and there is usually no question as to the validity of bonds negotiated only for the purpose of securing or paying debts contracted before the negotiation.<sup>7</sup> Accordingly, where bonds of a corporation were issued on the understanding that they were to be sold for cash, but were, in fact, pledged to a creditor as collateral to corporate notes held by him, it was held that the objection that this disposition of them was unlawful, was open only to the corporation or its stockholders, unless it also affected some existing right of other parties; and that it could not be raised by one who held the property of the corporation under a voluntary conveyance, or by a purchaser of the equity of redemption at execution sale.<sup>8</sup> But a statute may restrict corporations organized thereunder, to the issue of bonds for a new adequate valuable consideration, increasing the available funds of the company.<sup>9</sup> If part of a series of bonds is issued under an agreement that the rest

<sup>1</sup> *Brainard v. New York, etc. R. R.* (1863), 10 *Boswell*, 332; *Rutten v. Union Pac. R. R.* (1883), 17 *Fed.* 480.

<sup>2</sup> *Moses v. Philadelphia, etc. Co. (Ala.)* (1900), 29 *So.* 463.

<sup>3</sup> *New Jersey, etc. Co. v. Security, etc. Co.* (N. J. 1899), 42 *Atl.* 746.

<sup>4</sup> *Kelley v. Forty Second Street, etc. R. R.* (1899), 37 *N. Y. App. Div.* 500.

<sup>5</sup> *Jones on Corporate Bonds and*

*Mortgages*, § 169; *Fitch v. Wetherbee*, 110 *Ill.* 475.

<sup>6</sup> *Jones on Corporate Bonds and Mortgages*, § 170; *In re Atlantic, etc. R. Co.*, 3 *Hughes*, 320.

<sup>7</sup> *Lord v. Yonkers Fuel Gas Co.* (1886), 99 *N. Y.* 547.

<sup>8</sup> *Beecher v. Marquette, etc. Co.*, 45 *Mich.* 103.

<sup>9</sup> *Kemble v. Wilmington, etc. R. Co., 13 Phila.* 469, construing *Pa. Act of April 8, 1861.*

shall not be negotiated, the part so sold will have priority over the rest sold in violation of the agreement, and held by purchasers with notice.<sup>10</sup> But such a residue of unissued bonds is in no sense a collateral for the payment of the floating debt of the company.<sup>11</sup> Where the holders of first mortgage bonds agree to exchange them for second mortgage bonds, and surrender them but receive none in exchange, their debt holds the same priority as the bonds agreed to be issued in exchange, even outranking mortgages made prior to the agreement, to one with notice thereof.<sup>12</sup> Where bonds of a State are received and sold by a corporation which agrees to pay them, the corporation becomes the principal debtor, and the lien reserved to the State to secure the bonds, inures to the bondholders, although they have been declared unconstitutional and void as to the State.<sup>13</sup> When an act has been held to be unconstitutional by the State court, but has been upheld by the federal courts, bonds issued under it are proper subjects of compromise, and a tax levied to pay such compromise bonds is valid.<sup>14</sup> And bonds of a corporation, purchased by its receiver and entered on the books as investments, for years reported as outstanding, and then reissued for value, were held not to have been paid, and to be still secured by the original lien.<sup>15</sup>

**§ 1138. Debentures.**—A debenture is any written obligation of a corporation, undertaking to pay a debt. It may be sealed or unsealed. A simple bond or a bond and mortgage need not be recorded. In England it means a bond and mortgage without delivery of the property. It is negotiable, or non-negotiable, according to the terms. When negotiable, it corresponds with the bond in America.<sup>16</sup> In America it is not in accordance with the general statutes, and is rarely adopted.<sup>17</sup>

<sup>10</sup> *McMurray v. Moran* (1890), 134 U. S. 150.

<sup>11</sup> *Merchants' Bank v. Goddin*, 76 Va. 503.

<sup>12</sup> *Fidelity, etc. Co. v. Shenandoah Val. R. Co.* (1890), 33 W. Va. 761.

<sup>13</sup> *Tompkins v. Little Rock, etc. R. Co.*, 15 Fed. Rep. 6; *Railroad Cos. v. Schutte* (1880), 103 U. S. 118, 139, 140; *Trustees v. Jacksonville, etc. R. Co.*, 16 Fla. 708; *State v. Florida Central R. Co.*, 15 Fla. 690. *Cf. Littlefield v. Bloxam*, 117 U. S. 420; *Hay v. Railroad Co.*,

4 Hughes, 349; *Tompkins v. Little Rock, etc. R. Co.*, 5 McCrary, 602, 610, 18 Fed. Rep. 347, 352, 354, 21 Fed. Rep. 370.

<sup>14</sup> *State v. Hannibal, etc. R. Co.* (1890), 138 Mo. 332, 36 L. R. A. 451, 13 S. W. 505.

<sup>15</sup> *Gibbes v. Greenville & Columbia R. Co.*, 15 S. C. 304.

<sup>16</sup> *British, etc. Co. v. Inland Commr's.* (1881), L. R. 7 Q. B. D. 165.

<sup>17</sup> *Whitewater, etc. Co. v. Valllett* (1858), 21 How. 4141; *Orman v. English, etc. Trust* (1894), 61

**§ 1139. Power to borrow money, and issue bonds.**—Power to borrow, is one of the implied powers of a corporation and requires no statutory or charter authority.<sup>18</sup> The common law does not limit the amount. In the absence of express restrictions, the corporation has implied power to borrow money upon the issue of bonds. A grant to a railroad company of power to mortgage its road, includes power to borrow money and issue bonds secured by mortgage.<sup>19</sup> Power to issue bonds includes power to pledge them for money to pay a pre-existing debt.<sup>20</sup> “When a corporation can lawfully purchase property or procure money or loan in the course of its business, the seller or the lender may exact, and the purchaser or borrower must have the power to give any known assurance which does not fall within the prohibition, express or implied, of some statute. The particular restriction must be sought for in the charter of the corporation, or in some other statute binding upon it; but if not found in that examination, we may safely affirm that it has no existence.”<sup>21</sup> “There seems to be no reason why a railroad corporation should not be considered as having power to make a bond for any purpose for which it may lawfully contract a debt, without any special authority to that effect, unless restrained by some restriction, express or implied, in its charter, or in some other legislative act. A bond is merely an obligation under seal. A corporation having the capacity to sue and be sued, the right to make contracts, under which it may incur debts, and the right to make and use a common seal,—a contract under seal is not only within the scope of its powers, but was originally the usual and peculiarly appropriate form of corporate agreement.”<sup>22</sup>

The amount borrowed may be greater than the corporate capital stock.<sup>23</sup> It is no defense to the loan that it was made for an *ultra vires* purpose,<sup>24</sup> or that the officer embezzled the proceeds.<sup>25</sup> Although the mortgage be given for an amount of debt exceed-

Fed. 38; *Ward v. Johnson* (1880), 95 Ill. 215; *Bank Comm'rs v. New Hampshire* (1899), 69 N. H. 621.

<sup>18</sup> *Vide supra*, POWER TO ISSUE BONDS AND BORROW MONEY, §§ 854, 849; *Grommes v. Sullivan* (1844), 81 Fed. 45.

<sup>19</sup> *Gloninger v. Pittsburg, etc. Co.*, 139 Pa. St. 13.

<sup>20</sup> *Nelson v. Hubbard*, 96 Ala. 238, 17 L. R. A. 375.

<sup>21</sup> *Curtis v. Leavitt*, 15 N. Y. 9, 66, 194, 195.

<sup>22</sup> *Commonwealth v. Smith*, 10 Allen (92 Mass.), 448.

<sup>23</sup> *Barry v. Merchants' Exchange Co.* (1844), 1 Sandf. Ch. 280.

<sup>24</sup> *Marion, etc. Co. v. Crescent, etc. Co.* (1901), 27 Ind. App. 451, 87 Am. St. Rep. 257.

<sup>25</sup> *Reagan v. First National Bank* (Ind. 1902), 62 N. E. 701.

ing that allowed by statute, the corporation and its subsequent creditors are bound by it. Only the State can complain,<sup>26</sup> and the bonds are valid though for double the amount of the capital stock of the statutory limit.<sup>27</sup>

**§ 1140. Power to guarantee the bonds and securities of other corporations. Guaranty bonds, etc.**—A corporation must have express authority to guaranty a contract of another corporation or person, unless the contract comes within the scope of the former's necessary business.<sup>28</sup> When foreign to the objects for which the corporation was created, a corporation has no power to become surety or guarantor for another corporation or for a natural person, and thereby risk the corporate funds in a different enterprise from that authorized in its charter;<sup>29</sup> but the power exists expressly in the case of surety and guaranty companies, incorporated for such express purpose.<sup>30</sup>

**§ 1141. Recitals, references, between bonds and coupons and mortgages.**—The reference in coupons to the bonds and mortgage, and in bonds to the terms and conditions of the mortgage, clearly charge the holders of both coupons and bonds with notice of the provisions contained in each of those instruments.<sup>31</sup> And again, where a bond merely refers to the mortgage by which it is secured, the recitals in the mortgage will control with respect to the bond.<sup>32</sup> But where the bond itself sets forth the terms of the contract and there is a variance between it and the mortgage deed, the bond will control.<sup>33</sup> A recital in a bond that it is "secured by all the property and assets of the company" imports that it is secured by some particular lien.<sup>33a</sup>

<sup>26</sup> Sioux City, etc. Co. v. Trust Co. (1897), 82 Fed. 124, 173 U. S. 99 (1899).

<sup>27</sup> Fidelity, etc. Co. v. West Pennsylvania (1891), 138 Pa. St. 494, 21 Am. St. Rep. 911.

<sup>28</sup> *Vide supra*, § 853; Best, etc. Co. v. Klassen, 185 Ill. 37, 50 L. R. A. 765, 76 Am. St. Rep. 26; Humboldt Min. Co. v. American, etc. Co., 62 Fed. 356.

<sup>29</sup> Best Brewing Co. v. Klassen, 185 Ill. 37, 76 Am. St. Rep. 26; Lucas v. White, etc. Co., 70 Iowa, 541, 50 Am. Rep. 449; Humboldt Min. Co. v. American, etc. Co., 62 Fed. 356.

<sup>30</sup> Gans v. Carter, 77 Md. 1; Gutzeil v. Pennie, 95 Cal. 598.

<sup>31</sup> McClelland v. Norfolk, etc. R. Co. (1888), 110 N. Y. 469, 6 Am. St. Rep. 397; McClure v. Township of Oxford (1876), 94 U. S. 429.

<sup>32</sup> Caylus v. New York, etc. R. Co., 10 Hun, 295.

<sup>33</sup> Indiana, etc. R. Co. v. Sprague, 103 U. S. 756. Cf. Morgan v. United States, 113 U. S. 502; Rouede v. Jersey City, 18 Fed. Rep. 729.

<sup>33a</sup> Stickel v. Atwood (1903), 25 R. I. 456.

**§ 1142. Registration of bonds.**—Under the provision of an act requiring the registration of all bonds issued by public and private corporations, and prescribing a penalty for non-compliance therewith, an action at law may be maintained for the recovery of the penalty, although the minimum amount be not fixed by the act.<sup>34</sup> Under a section of the act which provides that any person placing corporate bonds in circulation, without making due returns thereof to the secretary of State, shall be subject to a fine for each bond so circulated, the only remedy is by indictment and an action at law can not be maintained.<sup>35</sup> In a prosecution under a registration act, the corporation may submit evidence of its good faith in issuing bonds without making a return thereof to the secretary of State, and of its ignorance of the law, by way of mitigation of damages.<sup>36</sup> Where transfers of bonds are required to be registered, and the secretary of the company is required to keep a register thereof open to the inspection of persons interested, those entitled to inspect the register may do so either in person or by attorney.<sup>37</sup>

**§ 1143. Maturity of bonds.**—A stipulation that on default in payment of any of the bonds at maturity, the mortgagor shall pay expenses of the holder in attorney's fees of five per cent on the judgment obtained, means fees upon the employment of an attorney, on default in any such payment.<sup>38</sup> Bonds, like other commercial paper, cease to be negotiable after maturity, and the purchaser is put upon inquiry concerning the equities of antecedent holders.<sup>39</sup> For after maturity a purchaser for value is not a *bona fide* purchaser to the extent of his being protected in his purchase except so far as he succeeds to the rights of one who

<sup>34</sup> *McDaniel v. Gate City Gas-Light Co.* (1887), 79 Ga. 58, decided under Ga. Act of Feb. 23, 1876.

<sup>35</sup> *McDaniel v. Gate City Gas-Light Co.* (1887), 79 Ga. 58.

<sup>36</sup> *McDaniel v. Gate City Gas-Light Co.* (1887), 79 Ga. 58.

<sup>37</sup> *In re Credit Co.*, 11 Ch. Div. 256, construing 8 Vic. ch. 16, § 45.

<sup>38</sup> *H. Abraham & Son v. New Orleans, etc. Assn.* (La. 1903), 35 So. 268.

<sup>39</sup> *Northampton Nat. Bank v. Kidder* (1887), 106 N. Y. 221, 225, 60 Am. Rep. 443; *Morgan v. United*

States, 103 U. S. 476, 499; *Vermilye v. Adams Express Co.* (1874), 21 Wall. 138, 145; *Hinckley v. Merchants' Nat. Bank*, 131 Mass. 147; *Evertson v. National Bank*, 66 N. Y. 14, 4 Hun, 692, 23 Am. Rep. 9; *Arents v. Commonwealth*, 18 Grat. 750; *First Nat. Bank v. County Comm'r's*, 14 Minn. 77, 79, 100 Am. Dec. 194; *Hotchkiss v. National Banks*, 21 Wall. 354; *National Bank v. Texas*, 20 Wall. 72; *Murray v. Lardner*, 2 Wall. 110; *Gelbough v. Norfolk, etc. R. Co.*, 1 Hughes, 410.

purchased in good faith before maturity.<sup>40</sup> For the fact of non-payment discredits the instrument and deprives it of any immunity which before maturity was secured to it in favor of *bona fide* purchasers for value without actual notice of any defect either in the obligation or in the title.<sup>41</sup> But overdue and unpaid coupons attached to a bond with time yet to run, do not render it nor the other coupons dishonored paper, so as to subject them in the hands of a purchaser for value to defenses good against the original holder.<sup>42</sup> Bondholders can not be compelled by the legislature, nor by the court, to accept payment before maturity, nor to relinquish their lien.<sup>43</sup> And a contract indorsed upon bonds, providing for a sinking fund to meet them at maturity, does not give the obligor the right to redeem them when the fund becomes sufficient for that purpose.<sup>44</sup> Where bonds payable upon the expiration of a term of years contain a clause providing that they "will be redeemed, if desired," at a certain earlier date, it is with the holder, and not with the payer, to choose between the two times of payment.<sup>45</sup> Bonds bear interest after their maturity at the same rate they bore before maturity.<sup>46</sup>

**§ 1144. Sinking fund for payment of bonds.**—Bonds may provide for establishment by the corporation, of a sinking fund for payment of the bonds by setting aside annual payments into a fund to be deposited for that purpose.<sup>47</sup> In such a provision the words, "sinking fund," do not necessarily imply accumulation.<sup>48</sup>

<sup>40</sup> Cromwell v. Sac County, 96 U. S. 51; Grand Rapids R. Co. v. Sanders, 54 How. Pr. 214; Thompson v. Perrine (1882), 106 U. S. 589; Commissioners v. Bolles, 94 U. S. 109; Commissioners v. Clark, 94 U. S. 279; McClure v. Township of Oxford, 94 U. S. 432; Arents v. Commonwealth, 18 Grat. 750.

<sup>41</sup> Northampton National Bank v. Kidder (1887), 106 N. Y. 221, 225, *per* Peckham, J.

<sup>42</sup> Cromwell v. Sac County (1877), 96 U. S. 51; National Bank v. Kirby, 108 Mass. 497. But see First National Bank v. County Commissioners, 14 Minn. 77, 100 Am. Dec. 194.

<sup>43</sup> Beach on Railways, § 648, citing Randolph v. Middleton, 26 N. J. Eq. 543.

<sup>44</sup> Chicago, etc. R. Co. v. Pyne, 30 Feed. Rep. 86.

<sup>45</sup> Beach on Railways, § 648, citing Allentown School District v. Derr (1887), 115 Pa. St. 439.

<sup>46</sup> Cromwell v. Sac County (1877), 96 U. S. 51, 61, where many cases are cited and a conflict of authority noted. Cf. Cook v. Fowler, L. R. 7 H. of L. 27; Price v. Great Western Ry. Co., 16 Mees. & W. 244.

<sup>47</sup> Wilds v. St. Louis, etc. R. R. (1886), 102 N. Y. 410; Central, etc. Co. v. Farmers', etc. Co. (1901), 116 Fed. 700; Missouri, etc. R. R. v. Union Trust Co. (1898), 156 N. Y. 592.

<sup>48</sup> Morrison v. Chicago, etc. Co. (1897), 77 L. T. 677.

**§ 1145. Negotiability of bonds and coupons.**—Bonds and coupons negotiable in form, are negotiable instruments having all the qualities and incidents of commercial paper.<sup>49</sup> This negotiable quality is not derived from the law merchant, but from the fact that these instruments have been invented for the purpose, and are actually treated as negotiable.<sup>50</sup> “This species of bonds is a modern invention, intended to pass by manual delivery, and to have the qualities of negotiable paper; and their value depends mainly upon this character. Being issued by States and corporations, they are necessarily under seal. But there is nothing im-

<sup>49</sup> *Zabriskie v. Cleveland, etc. R. Co.* (1859), 23 How. 381; *White v. Vermont, etc. R. Co.*, 21 How. 576, where the authorities are extensively reviewed; *Kenosha v. Lamson*, 9 Wall. 477; *Chicago, etc. R. Co. v. Howard*, 7 Wall. 392; *Rogers v. Burlington*, 3 Wall. 654; *Murray v. Lardner*, 2 Wall. 110; *Myer v. Muscatine*, 1 Wall. 382; *Van Hostrup v. Madison City, 1 Wall.* 291; *Moran v. Miami County*, 2 Black, 722; *Woods v. Lawrence County*, 1 Black, 386; *Ottawa v. Portsmouth National Bank* (1881), 105 U. S. 342; *Roberts v. Bolles*, 101 U. S. 119; *Humboldt v. Long*, 92 U. S. 642; *Lexington v. Butler*, 14 Wall. 282; *Mercer County v. Hacket*, 1 Wall. 83; *Gelpcke v. Dubuque*, 1 Wall. 175; *McClelland v. Norfolk Southern R. Co.* (1888), 110 N. Y. 469, 475, 4 Ry. & Corp. L. J. 545; *Everston v. National Bank*, 66 N. Y. 14, 23 Am. Rep. 9, annotated; *Brookman v. Metcalf*, 32 N. Y. 591; *Mechanics' Bank v. New York, etc. Ry. Co.*, 13 N. Y. 599; *Connecticut, etc. Co. v. Cleveland, etc. R. Co.* 41 Barb. 9; *Brainard v. New York, etc. R. Co.*, 25 N. Y. 496; *Blake v. Livingston County*, 61 Barb. 149; *De Voss v. Richmond*, 18 Gratt. 338; *Arents v. Commonwealth*, 18 Gratt. 750; *Langston v. South Carolina R. Co.*, 2 S. C. N. S. 248; *Craig v. Vicksburg*, 31 Miss. 216; *Maddox v. Graham*, 2 Met. (Ky.) 56; *Schooner v. Holmes* (1869), 102

Mass. 503, 3 Am. Rep. 491; *Chapin v. Vermont, etc. R. Co.*, 8 Gray, 575; *Myers v. York, etc. R. Co.*, 43 Me. 239; *Diamond v. Lawrence Co.*, 37 Pa. St. 353, 78 Am. Dec. 429; *Junction R. Co. v. Cleneay*, 13 Ind. 161; *Johnson v. Stark County*, 24 Ill. 92; *Clark v. Janesville*, 10 Wis. 140; *National Exchange Bank v. Hartford, etc. R. Co.*, 8 R. I. 375, 5 Am. Rep. 582; *Bridgeport v. Housatonic R. Co.*, 15 Conn. 502; *Bickley v. Welch*, 31 Conn. 342; *Morris Canal, etc. Co. v. Fisher* (1853), 9 N. J. Eq. 667, 64 Am. Dec. 428, annotated; *Beaver Co. v. Armstrong* (1863), 44 Pa. St. 63; *Commonwealth v. Perkins*, 43 Pa. St. 400; *Carr v. Fevre*, 27 Pa. St. 413; *Bank v. Jones*, 16 Ohio St. 145; *Eaton, etc. R. Co. v. Hunt*, 20 Ind. 457; *Eagle v. Kohn*, 84 Ill. 292; *Clerk v. Des Moines*, 19 Iowa, 213; *Griffiths v. Burden*, 35 Iowa, 138; “*Unregistered Securities & Limited Companies*,” 67 L. T. 260; *2 Schouler on Personal Property* (2d ed.), 569; *Parsons on Contracts*, 240; *Rorer on Railroads*, 250; Article on Coupons by C. W. Hassler, 4 Cent. L. J. 315.

<sup>50</sup> *Vide supra*. **NEGOIABILITY OF STOCK AND BONDS**, § 272. *Mercer Co. v. Hacket* (1863), 1 Wall. 95. Cf. *McCoy v. Washington County*, 3 Wall. Jr. 381; *Clarke v. Janesville*, 1 Biss. 98; *Morris Canal, etc. Co. v. Fisher* (1853), 9 N. J. Eq. 667, 64 Am. Dec. 423 and note p. 430.

moral or contrary to public policy in making them negotiable, if the necessity of commerce require that they should be so. A mere technical dogma of the courts of common law can not prohibit the commercial world from inventing or using any species of security not known in the last century. Usage of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton or Blackstone. And this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law. When a corporation covenants to pay to bearer, and gives a bond with negotiable qualities, and by this means obtains funds for the accomplishment of the useful enterprises of the day, it can not be allowed to evade the payment by parading some obsolete judicial decision that a bond, for some technical reason, can not be made payable to bearer. That these securities are treated as negotiable by the commercial usages of the whole civilized world, and have received the sanctions of judicial recognition, not only in this court, but of nearly every State in the Union,—is well known and admitted.”<sup>51</sup> And it is immaterial that the bonds may be under seal, for that is a mere incident of their issue by corporations, instead of by natural persons.<sup>52</sup> Accordingly they pass by delivery under assignment in blank and are not subject as specialties to any equities between the prior holders, nor between them and the obligor corporation.<sup>53</sup> And the *bona fide* holder of bonds has a right to presume that they are properly issued, where the corporation has the power under any circumstances to issue negotiable securities. They are no more liable to be impeached in his hands, than any other commercial

<sup>51</sup> Mr. Justice Grier in Mercer County v. Hackett, 1 Wall (U. S.) 83; Commonwealth v. Smith, 10 Allen (Mass.), 448, 87 Am. Dec. 672.

<sup>52</sup> Mercer Co. v. Hackett (1863), 1 Wall. 95; Dinsmore v. Duncan, 57 N. Y. 573, 15 Am. Rep. 534; Clark v. Iowa City, 20 Wall. 583; Gelpcke v. Dubuque, 1 Wall. 175; Morris Canal, etc. Co. v. Fisher (1853), 9 N. J. Eq. 667, 64 Am. Dec. 423, annotated; Langston v. South Carolina R. Co., 2 S. C. 248; Craig v. Vicksburgh, 31 Miss. 216; Virginia v. Chesapeake, etc. Canal

Co., 32 Md. 501; Chapin v. Vermont, etc. R. Co., 8 Gray, 575; Jackson v. York, etc. R. Co., 48 Me. 147; Carr v. La Fevre, 27 Pa. St. 413.

<sup>53</sup> Everston v. National Bank, 66 N. Y. 14, 23 Am. Rep. 9 and note; McClelland v. Norfolk Southern R. Co. (1888), 110 N. Y. 469, 475; Morris Canal, etc. Co. v. Fisher (1853), 9 N. J. Eq. 667, 64 Am. Dec. 423, and note; Brainerd v. New York, etc. R. Co., 25 N. Y. 496; Commissioners v. Aspinwall, 21 How. 539; Thompson v. Lee County, 3 Wall. 327.

paper.<sup>54</sup> So also, he may enforce the bond by suit in his own name, as commercial paper rather than a *chose in action*.<sup>55</sup> But, as in the case of negotiable paper generally, the transerrer only warrants the genuineness of the instrument<sup>56</sup> and his own title thereto, but not the solvency of the debtor nor the collectibility of the bond.<sup>57</sup> If, however, the assignee of a bond can not recover it from the obligor by reason of the consideration of it having failed before the assignment was made, he may recover back from the assignor the money he paid for the assignment, whether he hold his guaranty or not.<sup>58</sup>

**§ 1146. Essentials of negotiability.**—By the rules governing commercial paper it is essential to the negotiability of bonds and coupons that they should provide for the unconditional payment to a person, or order, or bearer, of a certain sum, at a time capable of exact ascertainment.<sup>59</sup> But the negotiability of this kind of paper is not destroyed by merely leaving the name of the payee blank,<sup>60</sup> for the holder may fill up the blank with his own name.<sup>61</sup> And where the bond itself fulfills all the requirements of negotiability, its character is not affected by the fact that the statute under which it is issued provides that the obligor may pay it at pleasure before due.<sup>62</sup> But if a bond, payable at a certain time, itself contains a condition by which the makers reserve the right "to pay the same at any time to be named by them," it is not negotiable.<sup>63</sup> And again if the place of payment be left blank,

<sup>54</sup> City of Lexington v. Butler (1871), 14 Wall. 282; Cooper v. Town of Thompson, 12 Blatch. 434, 437.

<sup>55</sup> Ottawa v. Portsmouth National Bank (1880), 103 U. S. 342. Cf. Dean v. Hall, 17 Wend. 214; Brush v. Reeves, 3 Johns. 439; 3 Kent's Commentaries, 78.

<sup>56</sup> Utley v. Donaldson (1876), 94 U. S. 29, 45; Flynn v. Allen, 57 Pa. St. 482; Strob v. Hess, 1 Watts & S. 153.

<sup>57</sup> Ketchum v. Duncan (1878), 96 U. S. 659, 677.

<sup>58</sup> Flynn v. Allen, 57 Pa. St. 482, 485; Kauffelt v. Leber, 9 Watts & S. 93.

<sup>59</sup> Everston v. National Bank, 66 N. Y. 14, 23 Am. Rep. 9; Frank v. Wessels, 64 N. Y. 155; Dinsmore v. Duncan, 57 N. Y. 573, 580, 15 Am. Rep. 534.

<sup>60</sup> Gelpcke v. Dubuque, 1 Wall. 176; Mercer County v. Hackett, 1 Wall. 83; Bronson v. La Crosse, etc. R. Co., 2 Wall. 283; White v. Vermont, etc. R. Co. (1888), 21 How. Pr. 575; Finegan v. Lee, 18 How. Pr. 186.

<sup>61</sup> Chapin v. Vermont, etc. R. Co., 8 Gray, 576; White v. Vermont, etc. R. Co. (1888), 21 How. 575; Hubbard v. New York, etc. R. Co., 14 Abb. Pr. 275.

<sup>62</sup> Ackley School Dist. v. Hall (1884), 113 U. S. 135; Indiana School Dist. v. Stone, 106 U. S. 183; Marine, etc. Manuf. Co. v. Bradley, 105 U. S. 280.

<sup>63</sup> Way v. Smith, 111 Mass. 523; Hubbard v. Moseley, 11 Gray, 170; Chouteau v. Allen (1879), 70 Mo. 290. So also if coupons be subject to the condition that the time of their payment should be

the bonds are non-negotiable.<sup>64</sup> The general rule, therefore, is that uncertainty in any one of the essential particulars of negotiability reduces the instrument to a mere *chase in action*.<sup>65</sup>

**§ 1147. Limitations on negotiability.**—There has been, especially in England, considerable hesitation in fully accepting the doctrine of the negotiability of bonds and coupons. The statute in that country recognizes no method of transfer except by deed wherein the consideration is truly stated.<sup>66</sup> Accordingly, it has been there held that the mere fact that a security is payable to a designated person, "his executors, administrators or transferees, or to the holder for the time being," does not make it assignable, free from equities between the original parties.<sup>67</sup> And the courts have seemed very reluctant to hold that even a bond payable to bearer, and without more, is commercial paper so as to cut off equities.<sup>68</sup> So also in Illinois, where the *bona fide* assignee of commercial paper secured by mortgage seeks relief in equity by

changed, altered and postponed from time to time at the option of a majority of the holders of a series of bonds simultaneously issued therewith, it would deprive them of one of the essential characteristics of negotiable paper. *Ruger, C. J.*, in *McClelland v. Norfolk Southern R. Co.* (1888), 110 N. Y. 469, 476, 4 Ry. & Corp. L. J. 545.

<sup>64</sup> *Parsons v. Jackson* (1878), 99 U. S. 434; *Jackson v. Vicksburg R. Co.*, 2 Woods, 141. Cf. *Indiana, etc. R. Co. v. Sprague*, 103 U. S. 762; *Jackson v. Ludeling*, 99 U. S. 513; *Rouede v. Jersey City*, 18 Fed. 722.

<sup>65</sup> *Jackson v. Vicksburg, etc. R. Co.*, 2 Woods, 141; *Sedgwick v. McKim*, 53 N. Y. 307; *Athenæum, etc. Assurance Soc. v. Pooley*, 3 De Gex & J. 294; *Watson v. Mid-Wales Ry. Co.*, L. R. 2 C. P. 598. For when bonds or coupons "contain especial stipulations and their payment is subject to contingencies not within the control of their holders, they are, by established rules, deprived of the character of negotiable instruments, and become exposed to any defense existing thereto, as be-

tween the original parties to the instrument. *Ruger, C. J.*, in *McClelland v. Norfolk Southern R. Co.* (1888), 110 N. Y. 469, 475, 4 Ry. & Corp. L. J. 545.

<sup>66</sup> 8 Vic. ch. 16, §§ 46, 49.

<sup>67</sup> *In re Natal, etc. Co.*, 3 Ch. App. 355.

<sup>68</sup> *In re General Estates Co.*, 3 Ch. 758; *In re Imperial Land Co.*, 11 Eq. 478; *In re Blakely, etc. Co.*, 3 Ch. 154; *Goodwin v. Roberts*, 1 App. Cas. 476. So also to exclude equities it has been said that it must be made to appear very clearly that the parties so intended. *In re Natal Investment Co.*, L. R. 3 Ch. App. 355. Cf. *Abberman Iron Works v. Mekens*, L. R. 5 Eq. Cas. 485, 517. And again, the equitable transferee's rights are limited to sums actually advanced or paid. *In re Romford Canal Co.* (1883), 24 Ch. Div. 85. And if the instrument is not negotiable at law, an assignee for value without notice derives no higher title than his assignor, whether the instrument is expressed to be payable to bearer or not. *Crouch v. Credit Foncier*, L. R. 8 Q. B. 374.

the foreclosure of the mortgage, the mortgagor may successfully interpose any defense which would have been available against the original payee or holder of the paper.<sup>69</sup> But there has been little difficulty in inducing the courts to accord practical negotiability. Thus, where debentures under the seal of a joint-stock company are deemed to be negotiable, they are held to possess the most important characteristic thereof, that of being in the hands of a *bona fide* holder, free from equities between the company and the primary holder.<sup>70</sup> And it has been repeatedly held that the company may lose its right to set up equities against a holder of its bonds, by a separate contract, and by its conduct, and that it may even be estopped by the representation, in the instrument itself, that it is payable to bearer.<sup>71</sup> So also in a modern case the facts that the instruments were negotiable in form, that they were so customarily regarded, and especially that in the particular case they had been so treated, were each regarded as conclusive.<sup>72</sup> Probably there has never been any doubt that where bonds assignable at law are transferred in accordance with the statutory provision, the transferee is the proper person to sue thereon.<sup>73</sup>

**§ 1148. Coupons.**—Coupons are evidences of the sums due for interest on the bonds, and the fact they are made payable at a particular place, does not make a presentation for payment at that place necessary before a suit can be maintained on them,<sup>74</sup> although the defendant may in such a case show that there were funds on deposit to meet them.<sup>75</sup> And to maintain suit on cou-

<sup>69</sup> Chicago, etc. R. Co. v. Loewenthal (1879), 93 Ill. 433, 450.

<sup>70</sup> *In re Blakely Ordinance Co.* (1867), L. R. 3 Ch. App. 154, citing *In re Agra*, etc. Bank, L. R. 2 Ch. App. 391.

<sup>71</sup> *In re Blakely*, etc. Co., 3 Ch. 154; *Deckson v. Swansea Vale Ry.* Co., L. R. Q. B. 44; *Graham v. Johnson*, 8 Eq. 37; *In re South Essex Co.*, 11 Eq. 157; *Higgs v. Assam*, etc. Co., L. R. 4 Ex. 387; *In re Northern Assam*, etc. Co., 10 Eq. 459; *In re Hercules Ins. Co.*, 19 Eq. 302; *Easton v. London*, etc. Bank (1886), 34 Ch. Div. 95; *Goodwin v. Robarts*, 1 App. Cas. 476.

<sup>72</sup> *Easton v. London Joint-Stock Bank* (1886), 34 Ch. Div. 95. In

this case Brownfield, L. J., said: "I am not myself so much afraid, so jealous, as the law was in past times of recognizing these instruments as negotiable, simply because they are not in the classified category of negotiable instruments."

<sup>73</sup> *Vertue v. East Anglian R. Co.* (1850), 5 Ex. 280.

<sup>74</sup> *Walnut v. Wade* (1880), 103 U. S. 683, 695; *Wallace v. McConnell*, 13 Pet. 136; *Irvine v. Withers*, 1 Stew. (Ala.) 234; *Montgomery v. Elliott*, 6 Ala. 701; *Warner v. Rising Fawn Iron Co.*, 3 Woods, 574.

<sup>75</sup> *Arents v. Commonwealth*, 18 Grat. 750; *Virginia*, etc. R. Co. v. *Clay*, MS., cited by 2 Daniel on

pons demand and protest are not necessary, although they be in the form of orders.<sup>76</sup> Interest upon overdue coupons is not illegal although it be compounding interest.<sup>77</sup> Accordingly, coupons bear interest from the day they are payable, if payment be neglected or refused.<sup>78</sup> The failure to present coupons for payment does not prevent the running of interest, although if the obligor shows that it had money ready to pay the coupons at the time and place where they were payable, this would be a defense to a claim for interest.<sup>79</sup> Where there is no stipulation concerning the rate of interest payable upon coupons after maturity, they will draw at the regular rate of interest in the State where they were issued. And this is the rule, although they be made payable at a financial metropolis situated in another State.<sup>80</sup> Interest coupons bear interest from maturity without presentation, where, though required to be presented at the office of the mortgagor, it does not appear that the debtor corporation was prepared to pay the coupons upon presentation.<sup>81</sup>

Coupons are in form of promissory notes, payable to bearer and attached to the bond for payment at stated periods of the interest thereon, are detachable from the bond and are negotiable. The

Negotiable Instruments, § 1490.  
See note to Morris Canal, etc. Co. v. Fisher, 64 Am. Dec. 428, 438.

<sup>76</sup> Nashville v. Potomac Ins. Co. (1872), 2 Baxt. 296; Nashville v. First National Bank, 1 Baxt. 402.

<sup>77</sup> Beaver Co. v. Armstrong, 44 Pa. St. 63. And coupons are free from the defense of usury. Canal Co. v. Valette, 21 How. 414; Morris Canal Co. v. Fisher, 1 Stockt. 667; Bank of Ashland v. Jones, 16 Ohio St. 145.

<sup>78</sup> Walnut v. Wade (1880), 103 U. S. 686; Aurora City v. West, 7 Wall. 82; Clark v. Iowa City, 20 Wall. 583; Town of Genoa v. Woodruff, 92 U. S. 502; Stewart v. Lansing, 104 U. S. 505; Ohio v. Frank, 103 U. S. 697; Gelpcke v. Dubuque, 1 Wall. 206; Hollingsworth v. Detroit, 3 McLean, 472; Thompson v. Lee County, 3 Wall. 227; Voss v. Philbrook, 3 Story, 336; Corcoran v. Chesapeake, etc. Canal Co., 1 McA. 358; Huey v. Macon (1888), 35 Fed. 481, 4 Ry.

& Corp. L. J. 427; Williams v. Sherman, 7 Wend. 112; Delafield v. Illinois, 2 Hill, 177; Arents v. Commonwealth, 18 Grat. 750; Philadelphia, etc. Co. v. Smith, 105 Pa. St. 195; Philadelphia, etc. R. Co. v. Fidelity, etc. Co., 105 Pa. St. 216. Whether attached to the bond or severed and transferred to another person. Rich. v. Seneca Falls, 8 Fed. Rep. 852, 19 Blatchf. 558; Philadelphia, etc. R. Co. v. Smith, 105 Pa. St. 195; Philadelphia, etc. R. Co. v. Fidelity, etc. Co., 105 Pa. St. 216.

<sup>79</sup> Walnut v. Wade (1880), 103 U. S. 696; Wallace v. McConnell, 13 Pet. 136; Huey v. Macon Co. (1888), 35 Fed. Rep. 481.

<sup>80</sup> Rogers v. Lee County, 1 Dill. 529; Huey v. Macon County (1888), 35 Fed. Rep. 481, 4 Ry. & Corp. L. J. 427.

<sup>81</sup> H. Abraham & Son v. New Orleans, etc. Assn. (La. 1903), 35 So. 268.

signature to the coupon may be lithographed.<sup>82</sup> They pass from hand to hand as promissory notes and any *bona fide* purchaser is protected without need of proving his title thereto.<sup>83</sup> The coupons are negotiable, only when the bond is negotiable.<sup>84</sup> The coupon, after detachment from the bond, is no longer subject to its conditions or those of the mortgage.<sup>85</sup> The pledgee of bonds is entitled to collect the coupons attached thereto.<sup>86</sup> If money be deposited to pay the coupon, no interest is allowed thereon.<sup>87</sup>

**§ 1149. Coupons as instruments sui generis.**—Coupons differ in some respects from any other kind of negotiable paper except in respect of their negotiability. For example they differ from bills of exchange in not being intended for acceptance when drawn on a bank.<sup>88</sup> They differ from promissory notes in respect to presentation and demand, interest and limitations. They also differ from other independent paper in that the release of the bond releases the coupons;<sup>89</sup> that when coupons are severed and transferred, they carry by implication an interest in the mortgage debt.<sup>90</sup> Coupons have no priority over the bond itself when both are due, but share in the fund *pro rata*.<sup>91</sup> Another distinction is that when coupons are converted, the measure of damages in a suit by the maker is their market value, and not as in the case of an individual note the sum he is ultimately compelled to pay.<sup>92</sup> Again, if coupons are pledged they can be sold on default of the pledgor,<sup>93</sup> whereas, if notes of private parties are pledged, the pledgee takes only the power of collection, not that of selling it.<sup>94</sup> Another distinction, in respect of days of grace, has some authority in its support. Thus, in Massachusetts it has been said

<sup>82</sup> McKee v. Vernon County (1874), 3 Dill. 210, 16 Fed. Cas. 188.

<sup>83</sup> New, etc. Co. v. Price (Ky. 1899), 50 S. W. 963.

<sup>84</sup> McClelland v. Norfolk, etc. R. R. (1888), 110 N. Y. 469, 1 L. R. A. 299, 6 Am. St. Rep. 397.

<sup>85</sup> Haskins v. Albany, etc. Co. (1902), 74 N. Y. App. 21.

<sup>86</sup> Warner v. Rising Fawn Iron Co. (1878), 3 Woods, 514.

<sup>87</sup> Grand Trunk R. R. v. Central, etc. R. R. (1900), 105 Fed. Rep. 411.

<sup>88</sup> Jones on Railroad Securities, § 317; Daniel on Negotiable Instruments, § 1490.

<sup>89</sup> State v. North Louisiana R. Co., 25 La. Ann. 65.

<sup>90</sup> *In re Sewall v. Brainerd*, 35 Vt. 364, 374.

<sup>91</sup> Welsh v. St. Paul, etc. R. Co., 25 Minn. 314.

<sup>92</sup> Tracy v. Talmadge, 14 N. Y. 162.

<sup>93</sup> City of Memphis v. Brown, 17 Am. L. T. R. 434; Brown v. Ward, 3 Duer, 660.

<sup>94</sup> Morris Canal Co. v. Fisher, 1 Stockt. 667; Morris Canal Co. v. Lewis, 1 Beasley, 323; Wheeler v. Newboh, 5 Duer, 29, 16 N. Y. 392; Brown v. Ward, 3 Duer, 660; Garlie v. Jones, 12 Johns. 146.

that the reasons for allowing days of grace on foreign bills of exchange, payable at sight, or at a future day certain, have little application to bonds with coupons, issued by a corporation to obtain money, which usually have a long time to run, and are commonly bought and held as an investment.<sup>95</sup> The same court said that the device of separate detachable interest warrants payable to bearer has been adopted for convenience, and courts have invested them, when detached, with many of the qualities of negotiable promissory notes, to carry into effect the intention of the parties apparent on the face of the contract, but they purport to be only promises to pay certain sums of money as interest on the principal obligation.<sup>96</sup> But in a leading New York case, holding that coupons are entitled to grace, the court argued that, coming within the ordinary definition of bills of exchange or promissory notes, coupons necessarily have all the characteristics of those instruments, and are entitled to the benefit of the grace allowed upon them.<sup>97</sup>

**§ 1150. Coupons likened to checks, etc.**—Coupons, when made payable to bearer, are transferable by delivery and are subject to the same rules and regulations, so far as respects the right and title of the holder, as negotiable bills of exchange and promissory notes.<sup>1</sup> They have been said to be checks rather than bills.<sup>2</sup> When payable at a particular office, they import that the debtor will have a deposit at the time and place specified to answer what is substantially a draft upon the fund.<sup>3</sup> Again, they

<sup>95</sup> Chaffee v. Middlesex R. Co. (1888), 146 Mass. 224, 235. See also Arents v. Commonwealth, 18 Grat. 750; 2 Daniel on Negotiable Instruments, §§ 1490a, 1505; and note to 64 Am. Dec. 428, 434.

<sup>96</sup> Chaffee v. Middlesex R. Co. (1888), 146 Mass. 224, 235. Cf. Bank v. Leach, 52 N. Y. 350; Macloon v. Smith, 49 Wis. 200; Jackson v. Railroad Co., 48 Me. 147; Rose v. Bridgeport, 17 Conn. 243; Beaver v. Armstrong, 44 Pa. St. 63.

<sup>97</sup> Evertson v. National Bank of Newport (1876), 66 N. Y. 14, 22.

<sup>1</sup> Lexington v. Butler, 14 Wall. 282; Ketchum v. Duncan, 96 U. S. 659; Cromwell v. Sac. County, 96 U. S. 58; Mercer Co. v. Hackett, 1

Wall. 95; Murray v. Lardner, 2 Wall. 110; Stewart v. Lansing (1881), 104 U. S. 505; Ohio v. Frank, 103 U. S. 697; Walnut v. Wade, 103 U. S. 683; Aurora v. West, 7 Wall. 82; Thomson v. Lee County, 3 Wall. 327; Philadelphia, etc. R. Co. v. Smith, 105 Pa. St. 195; Philadelphia, etc. R. Co. v. Fidelity, etc. Co., 105 Pa. St. 216; Bennington, etc. Bank v. Mount Tabor, 52 Vt. 87; "Negotiability of Detached Coupons," 8 So. L. Rev. N. S. 358.

<sup>2</sup> *In re Brown*, 2 Story, 502; Arents v. Commonwealth, 18 Grat. 773.

<sup>3</sup> Philadelphia, etc. Co. v. Adams, 54 Pa. St. 94.

are in the nature of promissory notes,<sup>4</sup> but have been held not to be promissory notes in origin nor in common speech, so as to be within an act giving bills and notes days of grace.<sup>5</sup> It is said that it is of very little consequence, however, whether they are promissory notes, bills, drafts or checks, for they have the same quality of negotiability as either of those instruments.<sup>6</sup>

**§ 1151. Coupons as negotiable instruments.**—Coupons when severed from the bonds to which they were originally attached are in legal effect equivalent to separate bonds for the different instalments of interest.<sup>7</sup> They are negotiable promises for the payment of money, and are therefore not to be considered as "goods" but as the representatives of money and subject to the same rules as bank bills and other negotiable instruments payable in money.<sup>8</sup> Accordingly, an action will lie by one bondholder against a corporation for interest due on a bond, although the principal is not yet due, and notwithstanding the fact that the mortgage securing the bond provides that upon default in payment of interest the trustees to whom the mortgage was executed shall, at the request of the holders of a certain amount of bonds, proceed by *sci. fa.* to collect interest and principal for the benefit of all bondholders equally.<sup>9</sup> Detached coupons circulate as independent securities,<sup>10</sup> unless they contain references to the bonds from which they were severed, which may destroy their independent negotiable nature.<sup>11</sup> So also where detached coupons refer upon their face to the bonds and purport to be for the semi-

<sup>4</sup> *Hinkley v. Railroad Co.*, 129 Mass. 52; and are promissory notes within the meaning of the United States statutes concerning national banks; although it is doubtful whether bonds can be so regarded. *First National Bank v. Bennington*, 16 Blatch. 53, 56; *Thompson v. Lee County*, 3 Wall. 327.

<sup>5</sup> *Chaffee v. Middlesex R. Co.* (1888), 146 Mass. 224, 235.

<sup>6</sup> *Beaver Co. v. Armstrong*, 44 Pa. St. 63, 69.

<sup>7</sup> *Clark v. Iowa City* (1873), 20 Wall. 589.

<sup>8</sup> *Clark v. Iowa City* (1873), 20 Wall. 589; *Connecticut v. Emigrant, etc. Bank*, 98 Mass. 12; *Spooner v. Holmes*, 102 Mass. 507; *Wookey v. Pole*, 4 B. & A. 1; *Geor-*

*gia v. Meeville*, 4 D. & D. 641, 3 B. & C. 45.

<sup>9</sup> *Montgomery County Agricultural Soc. v. Francis* (1882), 103 Pa. St. 378.

<sup>10</sup> *Nashville v. Potomac Ins. Co.* (1872), 21 Baxt. 296; *Nashville v. First National Bank*, 1 Baxt. 402.

<sup>11</sup> *McClelland v. Norfolk Southern R. Co.* (1888), 110 N. Y. 489. On the other hand recitals in the bonds are conclusive evidence in favor of a purchaser of the coupons who has no notice that the conditions precedent to the issue have not been fulfilled. *Marshall v. Elgin*, 3 McCrary, 35, 8 Fed. Rep. 783. *Cf. Lexington v. Butler*, 14 Wall. 282; *Kenosha v. Lawson*, 9 Wall. 483; *State v. Spartanburgh, etc. R. Co.*, 8 S. C. 129, 163.

annual interest accruing thereon, this puts the purchaser upon inquiry for the bonds and charges him with notice of all they contain.<sup>12</sup> Where, however, there are no references to the bonds, the coupons once detached and negotiated cease to be a mere incident of the bond and become independent claims, and their amount, with interest after demand of payment, is recoverable under a general count in debt,<sup>13</sup> even though the bonds for some reason may have been cancelled or paid before maturity.<sup>14</sup> And it has been said that detached coupons, even when overdue, are not to be counted as overdue paper until the maturity of the bonds from which they were cut.<sup>15</sup>

**§ 1152. Formal requisites, of negotiability of coupons.**—To be negotiable, a coupon must be so upon its face without reference to any other paper; if it is not payable to order or bearer and does not contain other equivalent words, it is not negotiable.<sup>16</sup> There are, however, cases declaring the more liberal rule that words of promise connected with a definite promisor,<sup>17</sup> or evidently

<sup>12</sup> McClure v. Township of Oxford (1876), 94 U. S. 429.

<sup>13</sup> National Bank v. Hartford, etc. R. Co. (1866), 8 R. I. 375; Ide v. Connecticut River R. Co., 32 Vt. 297, 299; Conors v. Aspinwall, 21 How. 536, 546; Beaver Co. v. Armstrong, 44 Pa. St. 63; Meyer v. City of Muscatine, 1 Wall. 384; Seybert v. City of Pittsburg, 1 Wall. 272; Van Hostrup v. Madison City, 1 Wall. 294; Sheboygan Co. v. Parker, 3 Wall. 93; Thompson v. Lee Co., 3 Wall. 327; White v. Vermont & Massachusetts R. Co., 21 How. 575, 577; Lexington v. Butler, 14 Wall. 282; Koshkonong v. Burton (1881), 104 U. S. 668, affirming 4 Fed. Rep. 373; Amy v. Dubuque, 98 U. S. 470; Knox County v. Aspinwall, 21 How. 539; Clark v. Iowa City (1873), 20 Wall. 583; City v. Lamson, 9 Wall. 477; First Nat. Bank v. Bennington, 16 Blatchf. 53; Junction R. Co. v. Cleaneay, 13 Ind. 161. But see Crosby v. New London, etc. R. Co., 26 Conn. 121; Shoemaker v. Goshen, 14 Ohio St. 569; White v. Vermont, etc. R. Co. (1858), 21 How. 575; McElrath v. Pittsburgh R. Co., 55 Pa. St. 189;

Beaver County v. Armstrong, 44 Pa. St. 63; Chapin v. Vermont, etc. R. Co., 8 Gray, 575.

<sup>14</sup> Walnut v. Wade, 103 U. S. 683; Clark v. Iowa City (1873), 20 Wall. 583; Stewart v. Lansing, 104 U. S. 505.

<sup>15</sup> Thompson v. Perrine (1882), 106 U. S. 589; Cromwell lv. Sac County (1877), 96 U. S. 51.

<sup>16</sup> Augusta Bank v. Augusta, 49 Me. 507 (1860), holding that evidence of commercial custom to the contrary was properly excluded; Evertson v. National Bank (1876), 66 N. Y. 14, 19, 20, 23 Am. Rep. 9, reversing 4 Hun, 692; Crosby v. New London, etc. R. Co., 26 Conn. 121; Jackson v. York, etc. R. Co. (1858), 48 Me. 147; Meyers v. York, etc. R. Co., 43 Me. 232; Cranch v. Credit Foncier, L. R. 8 Q. B. 374. The merest reference to the bond in a coupon, such as the statement that it is for interest upon the company's first mortgage bonds, is sufficient to destroy its independent negotiable character. McClelland v. Norfolk, etc. R. Co. (1888), 110 N. Y. 469, 6 Am. St. Rep. 397.

<sup>17</sup> McCoy v. Washington County,

expressing the intention of the obligor that they shall be negotiable, are all that is necessary to make them negotiable paper, however informally they may be worded.<sup>18</sup> And in a suit upon coupons, profert of the bond is not necessary, as the coupons circulate as independent securities.<sup>19</sup> When upon their face coupons refer to the bonds to which they are attached and purport to be for the interest accruing thereon, the purchaser of them is charged with notice of all that the bonds contain.<sup>20</sup>

**§ 1153. Bona fide purchaser of bonds and coupons.**—As an example of the almost complete invulnerability of the *bona fide* holder's position with respect to corporate bonds, must be mentioned the exception in their behalf to the doctrine of *lis pendens*.<sup>21</sup> This exception holds even though the paper was purchased during the pendency of a suit in which their issue was finally declared unconstitutional, the purchaser not being affected with notice thereof.<sup>22</sup> But while the issuing and delivering of bonds voted by a municipal corporation under an alternative proposition to one named company, or another also named, would be enjoined if timely application was made, yet as, by the terms of the proposition, the commissioners were authorized to issue and deliver the bonds to the company which should build the road, and as they had complied with such apparent authority, their action in the premises was voidable, and not void; and the bonds were

<sup>3</sup> Wall. Jr. 381; Smith v. Clark County, 54 Mo. 58; Johnson v. Stark County, 24 Ill. 75; Haven v. Grand Junction R. Co., 109 Mass. 88.

<sup>18</sup> McCoy v. Washington County, 3 Wall. Jr. 381; Woods v. Lawrence (1861), 1 Black, 360; Smith v. Clark County, 54 Mo. 58; Note to Morris Canal, etc. Co. v. Fisher, 64 Am. Dec. 428, 433.

<sup>19</sup> Nashville v. Potomac Ins. Co. (1872), 2 Baxt. 296; Nashville v. First Nat. Bank, 1 Baxt. 402.

<sup>20</sup> McClure v. Township of Oxford (1876), 94 U. S. 429; Harshman v. Bates Co., 92 U. S. 509. But see Evertson v. National Bank (1876), 66 N. Y. 14, 23 Am. Rep. 9, where a recital that it was for interest upon a bond of a certain denomination was held not to require the production of the bond in an action upon the coupon.

<sup>21</sup> *Vide supra*, BONA FIDE PURCHASER, §§ 273, 381, 395; County of Warren v. Marcy (1877), 97 U. S. 96.

<sup>22</sup> Lexington v. Butler, 14 Wall. 283; Marshall v. Elgin (1881), 3 McCrary, 35, 8 Fed. Rep. 783, 788; Douglass v. Pike County, 101 U. S. 687; County of Warren v. Marcy (1877), 97 U. S. 96; City v. Lamson, 9 Wall. 477. And if the law under which bonds were issued had been recognized as valid by the highest court of the state at the time of the purchase, no subsequent decision can affect their validity in the hands of *bona fide* purchasers for value. Marshall v. Elgin (1881), 3 McCrary, 35, 8 Fed. Rep. 783, 787, 788; City v. Lamson, 9 Wall. 477; Douglass v. Pike County, 101 U. S. 687.

only liable to be set aside before they had passed into the hands of an innocent purchaser for value.<sup>23</sup> In the case of interest coupons the question has arisen whether one who advances money to a corporation to enable it to redeem them, can claim to be a *bona fide* purchaser to the extent of keeping alive their lien on the mortgaged property to secure the money advanced. This depends upon whether in taking up the coupons he acted independently or as an agent of the company, that is whether they were *purchased* or *paid*.<sup>24</sup> But it is not to be assumed, when coupons are not paid in the usual manner, or at the usual place, or by the persons ac-

<sup>23</sup> North v. Platte County, 29 Neb. 447 (1890), 45 N. W. Rep. 692. But it has been held that purchasers of bonds issued under an unconstitutional statute are chargeable with notice of their illegal origin. Duke v. Brown, 96 N. C. 127 (1887); Markham v. Manning (1887), 96 N. C. 132. And if bonds be issued by the officers of a company to a party under a contract which amounted to a fraud upon the shareholders, a *bona fide* purchaser takes them subject to equities. Athenæum, etc. Ins. Co. v. Pooley, 3 De G. & J. 294. So, also, in a case in which the bonds of a railway company which had not been issued, were seized by soldiers in the war between the American states, and, together with overdue coupons attached, were negotiated at a very small price and under circumstances *prima facie* inconsistent with any view except a bad title, the purchasers could not sustain the position of *bona fide* holders without notice. Parsons v. Jackson (1878), 99 U. S. 434. Cf. Jackson v. Ludeling, 99 U. S. 513; Rouede v. Jersey City, 18 Fed. Rep. 722.

<sup>24</sup> The lien of coupons upon the corporate property is terminated by their payment and cannot be kept alive to secure one who advanced money to the company to enable it to pay them. Union Trust Co. v. Monticello, etc. R. Co., 63 N. Y. 311, 20 Am. Rep. 541.

But if the holder presents the coupons at the regular depository of the corporation where money is lodged for their payment, and accepts a draft therefor, it is payment because the agent had only authority to make payment. People v. Cromwell (1886), 102 N. Y. 477. And again the chief owner of the stock and bonds of a railroad company sold a majority of the stock and bonds, and afterwards pledged some of the bonds, subject to the contract, but gave the overdue coupons to his wife, thinking they would pass better with these off. Coupons on the bonds had never been paid, the bondholders and stockholders being the same, but were merely canceled. The purchaser sold his interests to complainant, and the former owner stated at the transfer that all coupons not canceled were with the bonds, and such was the understanding of all. On subsequent inquiry for missing coupons, the former owner stated that he sold the bonds with all the coupons of the date missing attached, but after two years the coupons given to the wife, which had apparently been forgotten, were discovered, and the husband tried to have them collected without disclosing their ownership, and made evasive statements as to them. And it was held, that the wife not being a *bona fide* purchaser, the coupons must be regarded as cancelled, and com-

customed to pay them, that the transaction is intended to be a payment.<sup>25</sup> Accordingly, one interested in a company may take up its coupons to save it from temporary difficulties and hold them against it under the original lien.<sup>26</sup>

**§ 1154. Lost or stolen bonds.**—Like commercial paper, coupon bonds are an exception to the rule that one can give no better title to personal property than he has himself.<sup>27</sup> The rule of *caveat emptor* does not apply to negotiable bonds and coupons. One who purchases them for value, before maturity, in good faith and without gross negligence, acquires a good title, even as against a prior owner from whom they have been stolen, to the extent of the principal and of such of the interest coupons as have not matured.<sup>28</sup> Mere negligence will not defeat the title of the purchaser. There must be either fraud or such negligence as amounts to fraud.<sup>29</sup> But when the ownership and theft of bonds of a negotiable character has been proven, the burden of proof is then upon the defendant to show the good faith of his purchase.<sup>30</sup> The purchaser is not affected with knowledge by a notice in a newspaper that bonds have been stolen, unless it be proven that he

plainant was entitled to an injunction restraining collection thereof by her, and requiring them to be delivered up. Chicago, etc. Ry. Co. v. Turner (1889), 79 Mich. 133, 44 N. W. Rep. 174, 7 Ry. & Corp. L. J. 188.

<sup>25</sup> Ketchum v. Duncan (1877), 96 U. S. 662, saying: "There can be no payment of coupons without an intention to pay them." See, also, Wood v. Guarantee, etc. Co. (1888), 128 U. S. 416.

<sup>26</sup> Ketchum v. Duncan (1877), 96 U. S. 665. Cf. Claffin v. Railroad Co., 4 Hughes, 36.

<sup>27</sup> *Vide supra*, LOST OR STOLEN BONDS OR STOCK, §§ 272, 274, 395; Fifth Ward Sav. Bank v. First Nat. Bank (1887), 48 N. J. 513; Carr v. Le Ferve, 27 Pa. St. 413, holding that possession is *prima facie* evidence of ownership of securities of this character.

<sup>28</sup> Spooner v. Holmes (1869), 102 Mass. 503, 3 Am. Rep. 491; Seybell v. National Currency Bank, 2 Daly, 383; Birdsall v. Russell, 29

N. Y. 220; Murray v. Lardner, 2 Wall. 110; Jones v. Nellis, 41 Ill. 482, 89 Am. Dec. 389, annotated; Arents v. Commonwealth, 18 Gratt. 750; note to Morris Canal, etc. Co. v. Fisher, 64 Am. Dec. 428, 435; Evertson v. National Bank, 66 N. Y. 14, 23 Am. Rep. 9; Hotchkiss v. National Banks, 21 Wall. 354 (1874); National Bank v. Texas, 20 Wall. 72 Murray v. Lardner, 2 Wall. 110; Gilbough v. Norfolk, etc. R. Co., 1 Hughes, 410.

<sup>29</sup> Phelan v. Moss (1871), 67 Pa. St. 59, 5 Am. Rep. 402; Seybell v. National Currency Bank, 2 Daly, 383; Snow v. Leatham, 2 C. & P. 314; Welch v. Sage, 47 N. Y. 143; Woodman v. Simons, 20 How. 366; Hamilton v. Vought, 34 N. J. 187.

<sup>30</sup> Northampton Nat. Bank v. Kidder (1887), 106 N. Y. 221, 229, 60 Am. Rep. 443; Bank of New York v. Carll, 55 N. Y. 440; Farmers' Nat. Bank v. Noxon, 45 N. Y. 762; Bank of Cortland v. Green, 43 N. Y. 298.

read it.<sup>31</sup> And, again, mere notice that certain bonds have been stolen will not defeat the purchaser's title, where he either failed to remember the fact or where it was impracticable, from the multiplicity of his business dealings, to record or regard notices of that character.<sup>32</sup> But there is no presumption in favor of a subsequent purchaser that the thief originally negotiated the bonds prior to maturity.<sup>33</sup> Where, however, the original holder serves notice of the loss of bonds, with coupons attached, on the obligor, the latter may, nevertheless, pay the coupons to one presenting the paper and showing that he is an innocent holder.<sup>34</sup>

**§ 1155. Income bonds.**—An income bond is one issued by a corporation, where the interest is made payable contingent upon receipt of surplus income by the corporation above its current obligations.<sup>35</sup> Its right to interest takes precedence to the right to payment of dividends. It may or may not be secured by mortgage. Unlike in the case of preferred stock, the income-bondholder is not entitled to vote. The bond creates no equitable lien upon the surplus corporate profits.<sup>36</sup> The rights of holders depend upon the terms of the bond and mortgage, if there be one.<sup>37</sup> They can not prevent consolidation of the corporation with another.<sup>38</sup>

**§ 1156. Alteration of numbers of bonds.**—An alteration of the serial numbers of a corporate bond, although done by a thief and for a felonious purpose, is not such a material alteration of the bond as to invalidate it in the hands of an innocent purchaser.<sup>39</sup> Especially is this the case where, as is usual, there is nothing in the appearance of the altered bonds, or the numbers, when purchased, which would excite the suspicion of a prudent and careful man, the alterations having been so skillfully effected as that

<sup>31</sup> Raphael v. Bank, 17 C. B. 161; Hagen v. Bowery Bank, 64 Barb. 197.

<sup>32</sup> Seybell v. National Currency Bank, 2 Daly, 383; Dinsmore v. Duncan, 57 N. Y. 573; Lord v. Wilkinson, 56 Barb. 593; Snow v. Leatham, 2 C. & P. 314. But see Vermilye v. Adams Express Co. (1874), 21 Wall. 138.

<sup>33</sup> Northampton Nat. Bank v. Kidder (1887), 106 N. Y. 221, 229, 60 Am. Rep. 443; Hinkley v. Merchants' Nat. Bank, 131 Mass. 147.

<sup>34</sup> Bainbridge v. Louisville, 83 Ky. 285, 289.

<sup>35</sup> Garrett v. May (1862), 19 Md. 177.

<sup>36</sup> Thomas v. New York, etc. Ry. Co. (1893), 139 N. Y. 163.

<sup>37</sup> State v. Cowen (1896), 83 Md. 549.

<sup>38</sup> Hart v. Ogdensburg, etc. R. R. Co. (1893), 69 Hun, 378.

<sup>39</sup> Wylie v. Missouri Pac. R. Co. (1890), 41 Fed. Rep. 623, 7 Ry. & Corp. L. J. 250; Morgan v. United States (1884), 113 U. S. 476.

they can only be discovered by the aid of a magnifying glass.<sup>40</sup> For the number of a bond is put upon it for the convenience of the maker in identifying it, and in no wise affects the substance of the paper, and may be disregarded by the purchaser as immaterial.<sup>41</sup> Accordingly, the original owner of a stolen bond can not recover the money due on it where the obligor had paid it, although its altered number was the same as that of a bond previously paid.<sup>42</sup> And it makes no difference that the bonds were, by statute, redeemable at the pleasure of the issuer, upon call, after a certain date, and had been duly called when bought by the purchasers.<sup>43</sup> But it has been said *obiter* that the alteration of the numbers in negotiable bonds was an alteration in material particulars. The question, however, in the case was whether the purchaser received the bonds under such suspicious circumstances as to deprive him of the protection of a *bona fide* purchaser, and the decision turned upon a question of fact.<sup>44</sup>

**§ 1157. Bonds issued below par.**—At common law corporations have the power to issue bonds for less than their par value in money or property for its use.<sup>45</sup> Though issued as a *bonus* with

<sup>40</sup> Morgan v. United States, 113 U. S. 476 (1884).

<sup>41</sup> Commonwealth v. Emigrant, etc. Bank, 98 Mass. 12; City of Elizabeth v. Force, 29 N. J. Eq. 587.

<sup>42</sup> City of Elizabeth v. Force, 29 N. J. Eq. 587.

<sup>43</sup> Morgan v. United States, 113 U. S. 476 (1884).

<sup>44</sup> Birdsall v. Russel, 29 N. Y. 220. In England, it was held, by the court of appeals, that the alteration of a Bank of England note by erasing the number and substituting another was a material alteration, and that a *bona fide* holder for value could not recover against the bank upon the altered note. The decision proceeded mainly, however, upon the consideration that the number upon such a note is an essential part of the note, because it has always been recognized to be so by the public, so that no one would take it if the number were not upon it. Suffell v. Bank of England (1882), 9 Q. B. Div. 555. The

observations of the master of rolls are in point. He says: "In an ordinary case it may be said that changing the number put on a bill of exchange or on a check will not affect the contract, and may not be a material alteration; but take the case of debentures issued by a company, or a bond issued by a turnpike trust or a foreign government, and that the bond is to be paid according to the number drawn by lot, which is a very common mode of payment; there although the number would not affect the contract on the face of the instrument, it really would affect the contract in another way, and I should think there would be no doubt in the world that in such a case an alteration of the number would be a material alteration in the instrument. *Vide supra*, FORGERY OF STOCK AND BONDS, §§ 281, 282.

<sup>45</sup> Gamble v. Queens County, etc. Co. (1890), 123 N. Y. 91, 9 L. R. A. 527; Farmers' etc. Co. v. Rockaway, etc. Co. (1895), 69 Fed. Rep.

stock, a *bona fide* holder may enforce payment of the bonds.<sup>46</sup> They may be issued for property or railroad construction work,<sup>47</sup> though its value is less than the par value of the bonds.<sup>48</sup> The corporation may issue bonds in payment for lands, though not worth the sum secured by the bonds.<sup>49</sup> A corporation, so long as solvent, does not hold its property in trust for its creditors. Although it is undergoing liquidation and distribution in good faith of its assets in part, among the stockholders, they can not be recovered by the receiver upon its subsequent insolvency.<sup>50</sup> Though bonds are fraudulently issued below par, that will not avail as defence against their enforcement by a *bona fide* holder. He may collect their full par value. "It is true that those parties in disposing of the bonds allowed to each purchaser of a one thousand dollar bond two hundred dollars of preferred and four hundred of common stock, but they did not seem to have profited by this themselves. And, if it were necessary to the negotiation of the bonds to give a bonus in stock, it can not be considered in the light of a mere donation. Nor, if it were done in good faith, would it necessarily afford a ground of complaint to dissenting stockholders. Certainly, if this bonus were received in ignorance of the fraud practiced upon the original mill-owners, and simply as an inducement to take the bonds, the dissenting stockholders could not compel the bondholders to submit to a deduction from their bonds of the par value of the stock received as a bonus, particularly in view of the fact that the stock might turn out to worthless."<sup>51</sup> Where the directors act as mere "dummies" of persons receiving the stock below par, the issue is legal, if all the stockholders consent to it.<sup>52</sup> In England debentures may be issued at a discount,<sup>53</sup> and directors themselves may take them as others do, and at the same discount.<sup>54</sup> Accordingly they may be

9; *The Vigilancia* (1895), 68 Fed. 781.

<sup>46</sup> *Thomson, etc. Co. v. Capital, etc. Co.* (1894), 65 Fed. 341.

<sup>47</sup> *Fogg v. Blair* (1891), 139 U. S. 118.

<sup>48</sup> *Rafferty v. Buffalo, etc. Co.* (1899), 37 N. Y. App. Div. 618; *Hudson River, etc. R. R. Co. v. Hanfield* (1899), 36 N. Y. App. Div. 605.

<sup>49</sup> *Seymour v. Spring, etc. Assn.* (1895), 144 N. Y. 333.

<sup>50</sup> *Lawrence v. Greenup* (1899), 97 Fed. 906.

<sup>51</sup> *Dickerman v. Northern, etc. Co.* (1900), 176 U. S. 181.

<sup>52</sup> *Coe v. East, etc. R. R.* (1892), 52 Fed. 531. *Vide supra, Bonds on Stock Issued Below Par,* § 289.

<sup>53</sup> *In re Anglo-Danubian, etc. Co.*, 20 Eq. 339; *In re Regents' Canal, etc. Co.* (1876), 3 Ch. Div. 43; *In re Compagnie Generale de Bellegarde* (1876), 4 Ch. Div. 470.

<sup>54</sup> *In re Compagnie Generale de Bellegarde* (1876), 4 Ch. Div. 470.

deposited as security for a loan of less than their face value and rank *pari passu* with the other debentures.<sup>55</sup> The Supreme Court of the United States also holds that a *bona fide* holder of bonds may collect their full amount from the company, although he paid less than their par value.<sup>56</sup> Justice Field, speaking for that court, says, "There are numerous decisions in conflict with this view of the law; but the sounder rule, and the one in consonance with the common understanding and usage of commerce, is that the purchaser, at whatever price, takes the benefit of the entire obligation of the maker. Public securities, and those of private corporations, are constantly fluctuating in price in the market; one day above par and the next below it, and often passing within short periods from one-half of their nominal value to their full value. Indeed, all sales of such securities are made with reference to prices current in the market, and not with reference to their par value. It would introduce, therefore, inconceivable confusion if *bona fide* purchasers on the market were restricted in their claims upon such securities to the sums they had paid for them."<sup>57</sup> Accordingly, in the absence of fraud, bonds ten times greater in amount than the sum paid the company therefor, have been upheld as valid.<sup>58</sup> An issue below par can not be attacked under laws against usury where the charter of a corporation allows it to borrow money on such terms as its directors may determine, and issue bonds or other evidences of indebtedness.<sup>59</sup> One who

<sup>55</sup> *In re Regents' Canal, etc. Co.* (1876), 3 Ch. Div. 43.

<sup>56</sup> *Cromwell v. Sac County (1877)*, 96 U. S. 51, 59; *Junction R. Co. v. Bank of Ashland* (1870),

12 Wall. 226; *Grand Rapids, etc. R. Co. v. Sanders*, 17 Hun, 552;

*Williams v. Smith*, 2 Hill, 301; *Stoddard v. Kimball*, 6 Cush. 469;

*Chicopee Bank v. Chapin*, 8 Met. 40; *Allaire v. Hartshorne* (1848),

21 N. J. 665; *Lay v. Wissman*, 36 Iowa, 305.

<sup>57</sup> *Cromwell v. Sac County (1877)*, 96 U. S. 51, 60. Where plaintiff's intestate conveyed a railway to defendant, and agreed to accept, as part of the purchase money, bonds secured by mortgage on the line, he is entitled, the bonds never having been given, to recover their full par

value, although they are below par in the market. *Texas, etc. Ry. Co. v. Gentry* (1888), 69 Tex. 625.

<sup>58</sup> *Duncomb v. New York, etc. R. Co.*, 88 N. Y. 1.

<sup>59</sup> *Traders' National Bank v. Lawrence Manuf. Co.* (1887), 96 N. C. 298. But see *Sherlock v. Winetka* (1873), 68 Ill. 539, where in holding that while an issue of corporate bonds below par is an abuse of power on the part of the corporate officers for which they are probably individually liable to the extent of the loss thereby incurred, yet that their act would not render the bonds void, the court intimated that it might be relied upon in the hands of the original holder as usury.

has, without consideration, received from an insolvent corporation its second mortgage bonds, is not rendered liable to the creditors of the corporation, as having withdrawn some of the funds of the corporation, by the fact that an interest coupon of the bonds has been paid, in the absence of proof that the payment was made by the corporation.<sup>60</sup> Nor is a bondholder of that character rendered liable by the fact that, on foreclosure of the first mortgage, the holders of the second mortgage bonds were given bonds of the new corporation formed to succeed the other, where it appears that the new corporation obtained the property from the purchaser at the foreclosure sale, who paid for it in first mortgage bonds, the price for which it sold being less than the amount of the first mortgage bonds.<sup>61</sup> Any dissenting stockholder may enjoin the issue, or have it set aside if *ultra vires* or fraudulent,<sup>62</sup> but the State by its attorney-general can not enjoin the issue.<sup>63</sup> General creditors may enjoin.<sup>64</sup>

*Usury as affecting bonds issued below par.*—A bond issued at full rate of interest, allowed by law and issued below par, is in effect an agreement to pay usurious interest,<sup>65</sup> but the courts disfavor the defense of usury in such cases; and in many States the defense is prohibited by statute.<sup>66</sup>

**§ 1158. Overissue of bonds.**—If more bonds are issued than the mortgage requires, and the particular bonds overissued cannot be distinguished from the others, a *bona fide* purchaser will participate in the security.<sup>67</sup> A corporation, unless prohibited, may, like an individual, issue its note in its regular business, and a *bona fide* purchaser of it will be protected.<sup>68</sup> A corporation has

<sup>60</sup> Christensen v. Illinois & St. L. Bridge Co. (1889), 52 Hun, 478, 6 Ry. & Corp. L. J. 232.

<sup>61</sup> Christensen v. Illinois & St. L. Bridge Co. (1889), 52 Hun, 478, 6 Ry. & Corp. L. J. 232. On a judgment for the subscription against a subscriber to railroad bonds which the company pledged and became unable to deliver, defendant is entitled to have credited the value of the bonds at the time of their hypothecation, and not merely their proportional value as measured by the mortgage security, when, after foreclosure of the mortgage, the bondholders sell out to another road

at a loss. Galena, etc. R. Co. v. Ennor (1888), 123 Ill. 505.

<sup>62</sup> Farmers', etc. Co. v. New York, etc. R. R. (1896), 150 N. Y. 410.

<sup>63</sup> State v. Farmers', etc. Co. (1891), 81 Tex. 530.

<sup>64</sup> Louisville T. Co. v. Louisville, etc. Ry. (1898), 174 U. S. 674.

<sup>65</sup> Schermerhorn v. Talman (1856), 14 N. Y. 93.

<sup>66</sup> Atlantic Trust Co. v. The Vigilancia (1896), 73 Fed. 452.

<sup>67</sup> *Vide supra*, OVERISSUE OF STOCK OR BONDS. WATERED STOCK, §§ 275-293; Stanton v. Alabama, etc. R. R. (1875), 2 Woods, 523.

<sup>68</sup> National, etc. Co. v. Rockland Co. (1899), 94 Fed. 335.

inherent power to issue bonds for payment of money without express power to do so. "There seems to be no reason why a railroad corporation should not be considered as having power to make a bond for any purpose for which it may lawfully contract a debt, without any special authority to that effect, unless restrained by some restriction, express or implied, in its charter, or in some other legislative act. A bond is merely an obligation under seal."<sup>69</sup> The bond may be valid even though unsecured, the mortgage being *ultra vires*. A corporation may pledge its own bonds for payment of any amount, though less than that for which it is allowed by statute to issue them.<sup>70</sup>

**§ 1159. Priority of bonds and of liens.**—Where the majority holder of first mortgage bonds of the original company, upon consolidation, consented to an issue of prior lien bonds on condition of receiving fifty-one per cent of them and of being allowed to judge of the expediency of issuing the remainder, and the designated prior lien bonds were issued to *bona fide* holders by the original corporation, secured upon its property alone, but none issued to such majority holder, and the agreement was otherwise violated, he did not lose his priority rights.<sup>71</sup>

*Holder's rights* of the bondholder relate to the date of the mortgage securing the bond.<sup>72</sup> The mortgage may provide for priority of one bond over another of the same issue.<sup>73</sup> First mortgage bonds have priority over second mortgage bonds, though issued later.<sup>74</sup> Want of power to mortgage its property can not affect the corporate power to issue bonds.<sup>75</sup> Coupon bonds, issued by a corporation under statutory authority, are subject to prior equities in the hands of an assignee, although he took them in due course of business, and without notice of the equities.<sup>76</sup>

**§ 1160. Respective rights of majority and minority bondholders.**—It is often provided in bonds and mortgages that any bondholder may consider the principal due upon default in the payment of any coupon for a certain time, usually six months.<sup>77</sup>

<sup>69</sup> Miller v. New York, etc. R. R. (1859), 8 Abb. Pr. 431.

<sup>70</sup> Illinois, etc. Bank v. Pacific R. R. (1897), 117 Cal. 332.

<sup>71</sup> *Vide infra*, PRIORITY OF LIENS, § 1180; Central Trust Co. v. New York, etc. Co. (N. Y. 1903), 68 N. E. 1115.

<sup>72</sup> Belden v. Burke (1893), 72 Hun, 51.

<sup>73</sup> McMurray v. Moran (1890), 134 U. S. 150.

<sup>74</sup> Claflin v. South Carolina R. R. (1880), 8 Fed. 118.

<sup>75</sup> Philadelphia, etc. Co. v. Lewis, 33 Pa. St. 33, 75 Am. Dec. 574.

<sup>76</sup> Georgetown Co. v. Fidelity, etc. Co. (Ky. 1904), 78 S. W. 113.

<sup>77</sup> *Vide infra*, RESPECTIVE RIGHTS OF MAJORITY AND MINORITY BOND-

It is more usually provided in corporate mortgages that upon default in payments of interest the trustees shall enter and take possession of the property upon the request of a majority of the bondholders.<sup>78</sup> But none of the bondholders can appropriate the security to themselves or impair its value to the others.<sup>79</sup> For each bondholder enters into contract relation with each and all of his co-bondholders. His right to appropriate the security in satisfaction of his bond in such lawful manner as he may choose, is modified by the same right in every other holder. His absolute right of control is limited not only by the express provisions of the bond and mortgage, but also in great measure by the peculiar nature and character of the security.<sup>80</sup> And to allow a small minority of bondholders, representing a comparatively insignificant amount of the mortgage debt, in the absence of any pretense even of fraud or unfairness, to defeat the wishes of an overwhelming majority of those associated with them in the benefits of their common security, would be to ignore entirely the relation which bondholders, secured by a mortgage, bear to each other.<sup>81</sup> It follows, therefore, that if there are differences of opinion among the bondholders as to what their interests require, it is not improper that the trustee should be governed by the voice of the majority, acting in good faith and without collusion.<sup>82</sup> And, of course, where the mortgage provides that the bonds may be considered due by any bondholder on default in payment of interest, a majority having availed themselves of the condition, a small minority should not be allowed to thwart their action by electing not to consider their bonds as due.<sup>83</sup> So, also, where suit was brought by a small minority of the bondholders, upon default in

HOLDERS, § 1193a; FORECLOSURE BY BONDHOLDERS, § 1193; Gates v. Boston, etc. R. Co. (1885), 53 Conn. 333.

<sup>78</sup> Beekman v. Hudson River, etc. R. Co. (1888), 35 Fed. 3, 4 Ry. & Corp. L. J. 220; State v. Brown, 64 Md. 199; First National, etc. Ins. Co. v. Salisbury (1881), 130 Mass. 303. Cf. 8 Vic. ch. 16, § 53. But these provisions have been held not to preclude the mortgage trustees from foreclosing in a proper case without waiting for the request of the bondholders, which is a provision in addition to the usual rights of the trustee

in his discretion to foreclose upon default. First National, etc. Ins. Co. v. Salisbury (1881), 130 Mass. 303.

<sup>79</sup> Jackson v. Ludeling (1874), 21 Wall. 616.

<sup>80</sup> Canada, etc. R. Co. v. Gebhard, 109 U. S. 534.

<sup>81</sup> Shaw v. Little Rock, etc. R. Co. (1879), 100 U. S. 605.

<sup>82</sup> Shaw v. Little Rock, etc. R. Co. (1879), 100 U. S. 605.

<sup>83</sup> Gates v. Boston, etc. R. Co. (1885), 53 Conn. 333; Shaw v. Little Rock, etc. R. Co. (1879), 100 U. S. 605, 612.

payment of interest, the principal debt having several years to run, it was held that dissenting bondholders should be allowed to purchase the bonds of those wishing to foreclose, and thereby put an end to the proceedings.<sup>84</sup> After a default has occurred, a majority of the bondholders may instruct the trustees to waive it, but an attempt on their part to waive future defaults and instruct the trustees to give an extension upon all the coupons for a number of years, so that the sums required for interest upon the bonds may be applied in improvements to the company's road,—is illegal.<sup>85</sup> And a dissenting bondholder may sue for the amount of his past-due coupons, notwithstanding the fact that the majority in interest have waived the rights secured to them by the mortgage.<sup>86</sup> There is no restriction upon the right of the coupon-holder to sue, without assent of a majority of the bondholders, except when advantage is sought to be taken of the default as advancing the date when the principal becomes due.<sup>87</sup> The suit can in any event be sustained for interest due.<sup>88</sup> And, even though the mortgage deed expressly prohibit the trustees from declaring the principal due upon default in payment of an interest instalment and from entering upon the property or foreclosing for the principal sum before the maturity of the bonds, unless requested to do so by the holders of a majority of them,—it has been decided that they may foreclose for a failure to pay interest at the request of a single bondholder.<sup>89</sup>

**§ 1161. Bond dividend.**—Bond dividend as well as a stock dividend is legal when all the stockholders agree to it and no creditor of the corporation is prejudiced thereby.<sup>90</sup> The corporation may pay dividends on preferred stock, with certificates exchangeable for its bonds, and thereby be estopped to refuse to deliver the bonds on the ground of illegality of the dividend or that the bond issue was *ultra vires*.<sup>91</sup> A dividend by distribution of

<sup>84</sup> *Tillinghast v. Troy, etc. R. Co.* (1888), 48 Hun, 420. In this case the bonds were above par in the market.

<sup>85</sup> *McClelland v. Norfolk, etc. R. Co.* (1888), 110 N. Y. 469, 6 Am. St. Rep. 397.

<sup>86</sup> *Manning v. Norfolk, etc. R. Co.*, 29 Fed. Rep. 838.

<sup>87</sup> *Beekman v. Hudson River, etc. R. Co.* (1888), 35 Fed. Rep. 3, 11.

<sup>88</sup> *Beekman v. Hudson River, etc. R. Co.* (1888), 35 Fed. Rep. 3, 11; *Chicago, etc. R. Co. v. Fosdick*, 106 U. S. 47.

<sup>89</sup> *Farmers' Loan & Trust Co. v. Chicago, etc. Ry. Co.*, 27 Fed. Rep. 146.

<sup>90</sup> *Vide supra, BOND DIVIDEND, § 472; Wood v. Leary* (1891), 124 N. Y. 83.

<sup>91</sup> *Chaffee v. Rutland R. R.*, 55 Vt. 110.

the company's bonds among its stockholders is legal if the capital stock is not thereby impaired.<sup>92</sup> Where a corporation has issued its surplus earnings to improve its property it may issue bonds as a dividend to its stockholders in place of a cash dividend.<sup>93</sup>

**§ 1162. Bonds convertible into stock.**—Bonds containing a provision for their exchange into stock of the company issuing them are sometimes authorized by statute together with provision for an increase of stock.<sup>94</sup> And it has been held that a statute authorizing the issue of bonds with the right of conversion into stock conferred authority upon the corporation to increase its capital stock beyond the amount fixed by its charter, if it were necessary so to do in order to issue shares of stock in exchange for the bonds.<sup>95</sup> But an eminent authority doubts this doctrine and discredits the cases upon which it rests.<sup>96</sup> The holder of convertible bonds may generally demand stock in exchange for them at any time before maturity, even just before payment of a dividend, in which case he is none the less entitled to the dividend.<sup>97</sup> But the issue of notes with coupons attached, convertible at two named periods into the stock of the company issuing them, does not operate as an appropriation of stock held by the company so as to give holders of the notes the rights of stockholders before the time arrives for the conversion.<sup>98</sup> A demand for conversion at ten minutes before three o'clock in the afternoon of the day of maturity, has been held to be in time.<sup>99</sup> But neither convertible bonds nor the coupons attached thereto are negotiable promissory notes within

<sup>92</sup> D'Ooge v. Leeds (1900), 176 Mass. 558, 57 N. E. 1025.

Eng. Corp. Cas. 110, 55 Am. Rep. 465.

<sup>93</sup> State v. Baltimore, etc. Co. (1847), 6 Gill (Md.), 363; Lorence v. Greenup (1899), 97 Fed. 906; Great Western, etc. Co. v. Harris Estate (1901), 111 Fed. 38.

<sup>96</sup> Jones on Corporate Bonds and Mortgages, § 62. But a company having power to increase its capital stock may receive its bonds in payment for its new shares.

<sup>94</sup> E. g. Chaffee v. Middlesex R. Co. (1888), 146 Mass. 224; Muhlenburgh v. Philadelphia, etc. R. Co., 47 Pa. St. 16.

Lohman v. New York, etc. R. Co., 2 Sandf. 39; Reed v. Hayt, 51 N. Y. Super. Ct. Rep. 121.

<sup>95</sup> Belmont v. Erie Ry. Co., 52 Barb. 637, 669. See also Ramsey v. Erie Ry. Co., 38 How. Pr. 193, 216; Beach on Railways, 633. Cf. Ramsey v. Gould, 57 Barb. 398, 8 Abb. Pr. (N. S.) 170; Pratt v. American Bell Telephone Co. (1886), 141 Mass. 225, 12 Am. &

<sup>97</sup> Jones v. Terre Haute, etc. R. Co., 57 N. Y. 196. But see Sutcliff v. Cleveland, etc. R. Co., 24 Ohio St. 147.

<sup>98</sup> Pratt v. American Bell Telephone Co. (1886), 114 Mass. 225.

<sup>99</sup> Chaffee v. Middlesex R. Co. (1888), 146 Mass. 224, 236. Cf. Muhlenburgh v. Philadelphia, etc. R. Co., 47 Pa. St. 16.

the meaning of statutes relating to days of grace.<sup>1</sup> The right to demand the conversion of the bond into stock, runs with the bond, and can not be retained when the bond is transferred; nor can it be transferred separately from the bond.<sup>2</sup> Upon the consolidation of two corporations, the holder of the bonds of one, containing a clause authorizing their conversion at any time into stock at par, can not be deprived of his right to demand conversion, and relegated to different rights conferred by the articles of consolidation, until he has had a fair opportunity, after notice, to exercise his original rights, and has elected not to do so.<sup>3</sup>

**§ 1163. Actions upon coupons.**—The owner of detached coupons may bring suit upon them in foreclosing, although he is not interested in the bonds.<sup>4</sup> And the bond need not be produced, if the coupons be declared on properly.<sup>5</sup> A count upon the coupon is all that is material, for production of the coupon at the trial will show its relation to the bond,<sup>6</sup> as it contains all necessary information, that it is issued for interest due at a certain day and place on a bond, giving its number and date.<sup>7</sup> But a recital in a general way of the bonds so as to bring into view the relation which the coupons originally held to them, is proper enough although unnecessary, and being by way of inducement or preamble only, does not make the suit one on the bonds instead of on the coupons.<sup>8</sup> But in a declaration upon income-bond coupons, it is necessary to allege and to prove the existence of net revenue.<sup>9</sup> The statutory limitation to the beginning of actions on coupons is the same as that on the bonds, and remains so even after they are detached.<sup>10</sup>

<sup>1</sup> Chaffee v. Middlesex R. Co. (1888), 146 Mass. 224, construing Mass. Stat., ch. 77, §§ 9, 10.

<sup>2</sup> Beach on Railways, § 633; Denny v. Cleveland, etc. R. Co., 28 Ohio St. 108, 114.

<sup>3</sup> Rosenkrans v. Lafayette, etc. Ry. Co., 18 Fed. Rep. 513.

<sup>4</sup> Kenosha v. Lamson (1869), 9 Wall. 477; Thompson v. Lee County, 3 Wall. 327; Kennard v. Cass County (1874), 3 Dill. 147.

Accordingly *assumpsit* will lie upon unsealed coupons although the bonds to which they were originally attached were under seal. First National Bank v. Bennington, 16 Blatchf. 53.

<sup>5</sup> Kenosha v. Lamson (1869), 9

Wall. 477; Kennard v. Cass County (1874), 3 Dill. 147.

<sup>6</sup> Kenosha v. Lamson (1869), 9 Wall. 477.

<sup>7</sup> Kenosha v. Lamson (1869), 9 Wall. 477. Therefore generally, in declaring upon coupons, they need only be identified by the number of the bond, the date, the amount, and time of payment. Kennard v. Cass County, 3 Dill. 147.

<sup>8</sup> Kenosha v. Lamson (1869), 9 Wall. 477.

<sup>9</sup> Corcoran v. Chesapeake, etc. Canal Co., 1 MacA. 358.

<sup>10</sup> Jones on Corporate Bonds and Mortgages, § 267; Kenosha v. Lamson, 9 Wall. 477; Clark v.

But the statute begins to run against coupons from the time they mature, although they remain attached to the bonds.<sup>11</sup> They are barred by limitation from their own date, not that of the bond.<sup>12</sup>

**§ 1164. Taxation of bonds. Federal and State bonds not taxable.**—The instruments of government by the United States are not taxable; accordingly United States bonds can not be taxed by any State; nor are the bonds of a State taxable by the United States.<sup>13</sup> But shares of stock in national banks are made taxable by the States, by express provision of the national banking act.<sup>14</sup> In England as also in the United States, government bonds were formerly called stock, a practice, which has now generally ceased.<sup>15</sup> Bonds of domestic corporations held by non-residents, are not taxable by the State creating the corporation.<sup>16</sup> In Pennsylvania, bonds of domestic corporations, owned by citizens of the State, are taxed by the State, and the corporation is compelled to deduct the tax from the interest on the bonds. This system is not unconstitutional.<sup>17</sup>

**§ 1165. Attachment, levied on bonds by garnishment of the corporation.**—Corporate bonds unissued are not subject to attachment for debts of the corporation.<sup>18</sup> Negotiable bonds, held outside of the court's jurisdiction, are not subject to attachment by garnishment of the corporation which issued the bonds. The debtor may have sold them.<sup>19</sup>

Iowa City, 20 Wall. 583; Koshkonong v. Burton, 104 U. S. 668; Lexington v. Butler, 14 Wall. 282; McCoy v. Washington Co., 3 Wall. Jr. 381.

<sup>11</sup> Amy v. Dubuque (1878), 98 U. S. 470.

<sup>12</sup> Clark v. Iowa City, 20 Wall. 583; Ferry v. Ferry, 2 Cush. 92; Huey v. Macon County (1888), 35 Fed. Rep. 481, 4 Ry. & Corp. L. J. 427; City of Lexington v. Butler, 14 Wall. 296; Kenosha v. Lamson, 9 Wall. 477; Amy v. Dubuque, 98 U. S. 470.

<sup>13</sup> *Vide supra*, TAXATION OF

BONDS, § 506a; Cooley on Taxation, 84.

<sup>14</sup> U. S. Rev. Stats., § 5219.

<sup>15</sup> Bank of Commerce v. New York (1862), 2 Black, 620.

<sup>16</sup> People v. Eastman (1864), 25 Cal. 603.

<sup>17</sup> Bell's Gap v. Pennsylvania (1890), 134 U. S. 232.

<sup>18</sup> Richardson v. Green (1890), 133 U. S. 30.

<sup>19</sup> Junction R. R. Co. v. Cleneay (1859), 13 Ind. 161; Von Hesse v. MacRaye (1890), 55 Hun, 365. *Vide supra*, ATTACHMENT BY GARNISHMENT, § 651.

## CHAPTER XLVIII.

### MORTGAGE.

<p>§ 1166. Power to mortgage corporate property and franchises.</p> <p>1167. The power is vested in the directors.</p> <p>1168. Shareholders' consent, when required.</p> <p>1169. What amounts to a mortgage. Mortgage by an insolvent corporation.</p> <p>1170. Formal requisites of mortgage or deed of trust.</p> <p>1171. Mortgage trustees. Eligibility and duties.</p> <p>1172. Trustees as receivers.</p> <p>1173. The mortgage does not include the corporate franchise.</p> <p>1174. When it covers choses in action. Specific property not included. "Undertaking." "De-</p>	<p>benture." "Going concern."</p> <p>1175. Mortgage covers rolling stock.</p> <p>1176. Mortgage covers after-acquired property.</p> <p>1177. When mortgage covers fixtures. What they include.</p> <p>1178. Mortgage of income.</p> <p>1179. Recording mortgages.</p> <p>1180. Priorities among mortgages.</p> <p>1181. (a) Superior liens. Execution. Mechanic's lien. Taxes, etc.</p> <p>1182. (b) "Six-months rule" as to labor and supply claims.</p> <p>1183. (c) Debts for operating expenses. Receiver's Certificates.</p>
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#### References:

- Foreclosure of mortgage. Sections 1184-1204.
- Mortgage by "holding" corporations. "Trusts." Section 938.
- Liens. Sections 488-495, 1191.
- Corporate power to mortgage. Sections 845-848.
- Railroad companies' power to mortgage. Section 1052.

**§ 1166. Power to mortgage. Corporate property and franchises.**—The power to borrow money implies the power to secure payment thereof by mortgage of the corporate property, but not of the franchises.<sup>1</sup> But it does not generally imply the power to mortgage its franchises as distinguished from the company's tangible property; nor in any case can a company mortgage the franchise of corporate existence.<sup>2</sup> The doctrine that a corporation can not mortgage the franchise of corporate existence is not founded upon any technical theory nor arbitrary rule, but upon

<sup>1</sup> *Vide supra*, §§ 845, 847.

<sup>2</sup> *Vide supra*, § 847.

the reasonable implication that it would be contrary to the intention of the legislature and subversive of the purposes for which the franchise was granted.<sup>3</sup> This doctrine is applicable to manufacturing corporations<sup>4</sup> as well as to *quasi-public* companies.<sup>5</sup> The general rule, however, has been doubted in Maine,<sup>6</sup> upon the ground that the personnel of corporations is a matter of no importance.<sup>7</sup> And in Wisconsin, under a charter authority to execute such securities as it might deem expedient, a railroad has been held to have the power to mortgage its entire road with all its franchises.<sup>8</sup> The power to mortgage corporate property is co-extensive with the power to alienate it absolutely.<sup>9</sup> Thus authority

<sup>3</sup> *East Boston, etc. R. Co. v. Easton R. Co.* (1866), 13 Allen, 422; *Commonwealth v. Smith*, 10 Allen, 488, 87 Am. Dec. 672; *Richardson v. Sibley*, 11 Allen, 65, 87 Am. Dec. 700; *East Boston, etc. R. Co. v. Hubbard*, 10 Allen, 459; *Meyer v. Johnston* (1875), 53 Ala. 237; *Louisville, etc. R. Co. v. Metcalf*, 4 Met. (Ky.) 199; *Pullan v. Cincinnati, etc. R. Co.*, 4 Biss. 35; *Pollard v. Maddox* (1856), 28 Ala. 321; *Dunham v. Isett*, 15 Iowa, 284. But a mortgage of franchises and property may create a valid lien upon the property, although illegal as to the franchises. *Central, etc. Mining Co. v. Platt*, 3 Daly, 263.

<sup>4</sup> *Lord v. Yonkers, etc. Co.*, 99 N. Y. 547.

<sup>5</sup> *Arthur v. Commercial, etc. Bank*, 11 Miss. 394; *State v. Mexican, etc. R. Co.*, 3 Rob. (La.) 513; *Black v. Delaware, etc. Canal*, 22 N. J. Eq. 130; *Stewart's Appeal* (1867), 56 Pa. St. 413; *Randolph v. Wilmington, etc. R. Co.*, 11 Phila. 502; *Hays v. Ottawa, etc. R. Co.*, 61 Ill. 422; *Hart v. Eastern Union Ry. Co.*, 7 Ex. 246; *Pullan v. Cincinnati, etc. R. Co.* (1873), 4 Biss. 35; *Carpenter v. Black Hawk, etc. Co.*, 65 N. Y. 43; *Troy, etc. R. Co. v. Kerr*, 17 Barb. 581; *New Orleans, etc. R. Co. v. Harris* (1854), 27 Miss. 517; *Stewart v. Jones*, 40 Mo. 140; *Daniels v. Hart*, 118 Mass. 543; *Pierce v.*

*Emery*, 32 N. H. 484; *Wood v. Bedford, etc. R. Co.*, 8 Phila. 94; *Atkinson v. Marietta, etc. R. Co.* (1864), 15 Ohio St. 21.

<sup>6</sup> *Kennebec, etc. R. Co. v. Portland, etc. R. Co.* (1871), 59 Me. 9, 23.

<sup>7</sup> *Shepley v. Atlantic, etc. R. Co.* (1867), 55 Me. 407.

<sup>8</sup> *Pierce v. Milwaukee, etc. R. Co.* (1869), 24 Wis. 551.

<sup>9</sup> "The Power of a Railroad Company to Mortgage its Property and Franchises" (1885), by Leonard A. Jones, 19 Am. L. Rev. 440. It has been held that to confer upon a corporation the power to mortgage its property and franchises, it is not requisite that the words of the statute or of its charter should expressly authorize it so to do if there is by reasonable implication an intention shown by the legislature to authorize it. *East Boston, etc. R. Co. v. Eastern R. Co.* (1866), 13 Allen, 422. The power to mortgage the franchises of a corporation necessarily implies the right to transfer both the franchise and the corporeal property requisite to the exercise to the purchaser at the foreclosure sale. *New Orleans, etc. R. Co. v. Delemore* (1885), 114 U. S. 501; *Galveston, etc. R. Co. v. Cowdrey*, 11 Wall. 459; *Phillips v. Winslow*, 18 B. Mon. 431. Cf. *Traer v. Clews*, 115 U. S. 534.

given to a company by special act of the legislature to transfer all its property and rights to another corporation, confers upon it authority to mortgage its property and rights to the other.<sup>10</sup> And, generally, a charter conferring the right to acquire, alien, transfer and dispose of property of every kind, confers the power to mortgage.<sup>11</sup> So also, if a corporation, besides being authorized to acquire, purchase, dispose of, and convey real and personal property, is empowered to negotiate its paper and to borrow money, it has power to mortgage its property to secure the loans.<sup>12</sup> The power of a trading corporation to mortgage its property, as security for money borrowed in the prosecution of its business, exists by implication in the absence of charter limitations.<sup>13</sup> And it may be regarded as well settled that property which a company has not acquired under the right of eminent domain, and which is not requisite to the performance of its duties to the public, may be alienated or mortgaged without legislative authority.<sup>14</sup> Authority

<sup>10</sup> East Boston Freight Co. v. Eastern R. Co., 18 Allen, 422.

<sup>11</sup> McAlister v. Plant, 54 Miss. 106; Commissioners of Craven v. Atlantic, etc. Co. (1877), 77 N. C. 289; Burr v. McDonald, 3 Grat. 215; Lucas v. Pitney (1859), 27 N. J. 221; Union Bank v. Jacobs, 6 Humph. 515; Savannah, etc. R. Co. v. Lancaster, 62 Ala. 555; Oxford Iron Co. v. Spradley, 46 Ala. 98; Booth v. Robinson, 55 Md. 419; Thompson v. Lambert, 44 Iowa, 239; Ward v. Johnson, 95 Ill. 215; Bradley v. Bullard, 55 Ill. 413, 7 Am. Rep. 656; Kent v. Quicksilver Mining Co. (1879), 78 N. Y. 159; Hope, etc. Ins. Co. v. Perkins, 38 N. Y. 404; Nelson v. Eaton, 26 N. Y. 410; Curtis v. Leavitt, 15 N. Y. 9; Clark v. Titcomb, 42 Barb. 122; Uncas National Bank v. Rith, 23 Wis. 339; *In re International, etc. Soc.*, L. R. 10 Eq. 312; Australian, etc. Co. v. Mounsey, 4 K. & J. 733; Bank of Australia v. Breillat, 6 Moo. P. C. 152, 193; Kelly v. Alabama, etc. R. Co., 58 Ala. 489; Commissioners v. Atlantic, etc. R. Co., 77 N. C. 289; Blackburn v. Selma, etc. R. Co., 2 Flip. 525, where it was held that a railroad corporation, when not restricted

by its charter might acquire lands *ad libitum*, and where it executed a mortgage to secure bonds to be used to raise money for construction purposes might buy lands with part of the bonds to be utilized by including them in the mortgage as additional security for all the bonds. A railway company having authority to raise money by the issue of its own bonds has power to guaranty the bonds of municipal corporations which are issued in its aid to pay debts due it or in which it is interested. Railroad Co. v. Howard (1868), 7 Wall. 392; Bonner v. City of New Orleans, 2 Woods, 125; Rogers Locomotive Works v. Southern R. Assn., 34 Fed. Rep. 278; Law v. California Pacific R. Co., 52 Cal. 53.

<sup>12</sup> Taylor v. Agricultural & M. Assn., 68 Ala. 229.

<sup>13</sup> Wood v. Meyer (Miss. 1890), 7 So. Rep. 359.

<sup>14</sup> Farnsworth v. Minnesota, etc. R. Co. (1875), 92 U. S. 49; Tucker v. Ferguson, 22 Wall. 527; Hendee v. Pickerton, 14 Allen, 381; Blackmore v. Yates, L. R. 2 Ex. 225; Browne & Theobald's Ry. Law, 85; Pickering v. Ilfracombe Ry. Co.,

to mortgage carries with it the right to make the usual conditions, but not those of an extraordinary or unusual nature.<sup>15</sup> Authority to mortgage the whole corporate property includes the right to mortgage property in whatever way acquired, and for debts whenever incurred,<sup>16</sup> or to mortgage any part of the property.<sup>17</sup>

**§ 1167. The power is vested in the directors.**—The power to mortgage the corporate property is in the board of directors only. They require no vote of the shareholders.<sup>18</sup> The ratification by the stockholders of an *ultra vires* mortgage does not validate it.<sup>19</sup> A mortgage made without authority may be ratified by express resolution of the board of directors, or by accepting benefits under it, or by mere acquiescence.<sup>20</sup> As a general rule the extraordinary powers of a corporation are reserved to the members at large, and are not to be exercised by the directors, unless delegated to them by the members,<sup>21</sup> and while this rule is, and as it would seem appropriately, applied to the power to mortgage, by the statutes of several States and the charters of many companies,<sup>22</sup> yet in the absence of any contrary provision in the statutes or charter, it is held that the powers of a company herein must be exercised by

L. R. 3 C. P. 235; Gardner v. London, etc. Ry. Co., 2 Ch. 201. See, however, Landowners', etc. Co. v. Ashford, 16 Ch. Div. 411, 437. Under a general power of borrowing and of issuing debentures, debentures issued in discharge of an existing debt are valid. Inns of Court Hotel Company, L. R. 6 Eq. 82.

<sup>15</sup> Savannah, etc. R. Co. v. Lancaster (1878), 62 Ala. 555; Pacific, etc. Co. v. Dayton, etc. R. Co., 5 Fed. Rep. 852; Jessup v. City Bank, 14 Wis. 331; Hart v. Eastern Union Ry. Co., 7 Ex. 246.

<sup>16</sup> Galveston, etc. R. Co. v. Cowdry, 11 Wall. 459.

<sup>17</sup> Pullan v. Cincinnati, etc. R. Co. (1873), 4 Biss. 35.

<sup>18</sup> Phinizy v. Augusta, etc. R. R. (1894), 62 Fed. Rep. 678; Farmers', etc. Co. v. Equity, etc. Co. (1895), 84 Hun. 373; Blood v. La Serena, etc. Co. (1896), 113 Cal. 221.

<sup>19</sup> Curtin v. Salmon, etc. Co. (1900), 130 Cal. 345, 80 Am. St. Rep. 132.

<sup>20</sup> Shaver v. Hardin (1891), 82 Iowa, 378.

<sup>21</sup> *Vide supra*, § 559.

<sup>22</sup> 8 Vic. ch. 16, § 38; Mass. Pub. Stat., ch. 106, § 23; Tex. Rev. Stat., § 4220, as to railways. The provision of the English act is held to be directory only, and does not invalidate securities issued without the authority of a general meeting, even in the hands of the original allottee, if he has no notice of any irregularity. *In re Romford Canal*, 24 Ch. Div. 85; Landowners', etc. Co. v. Ashford, 16 Ch. Div. 411; Fontaine v. Carmathen Ry. Co., 5 Eq. 316. The statute giving church trustees authority, under the direction of the society, to mortgage real estate, does not require a two-thirds vote, as in the case of a sale or conveyance. Scott v. Jackson Methodist Church, 50 Mich. 528. These statutes are not applicable, however, to foreign corporations. Saltmarsh v. Spaulding (1888), 142 Mass. 224, 4 Ry. & Corp. L. J. 151.

the directors.<sup>23</sup> Thus the directors of a gas-light corporation organized under the New York laws relating to the organization of such companies, may execute a mortgage to secure a debt without the written consent of two-thirds of its stockholders.<sup>24</sup> A committee of the board of directors, whether especially authorized or not, may also be empowered by the board to negotiate loans and execute the company's mortgage therefor.<sup>25</sup> But directors can not make a mortgage to themselves,<sup>26</sup> nor thereby secure themselves an advantage over other creditors.<sup>27</sup> The power of a corporation established for certain specified purposes must depend upon what those purposes are, and except so far as it has express powers given to it, it will have such powers only as are necessary for the purpose of enabling it in a reasonable and proper way to discharge the duties, or fulfill the purposes for which it was constituted.<sup>28</sup> If,

<sup>23</sup> Australian, etc. Co. v. Mounsey (1858), 4 Kay & J. 733; Taylor v. Agricultural, etc. Assn. (1880), 68 Ala. 229; Burrill v. Nahant Bank (1840), 2 Met. 163, 35 Am. Dec. 395; Hendee v. Pinkerton, 14 Allen, 381; Tripp v. Swansey Paper Co., 13 Pick. 291; Wood v. Whelen (1879), 93 Ill. 153.

<sup>24</sup> Davidson v. Westchester Gas-Light Co., 99 N. Y. 558, construing the act of 1872, which omits that provision contained in the act of 1848.

<sup>25</sup> Taylor v. Agricultural, etc. Assn. (1880), 68 Ala. 229; Burrill v. Nahant Bank (1840), 2 Met. 162.

<sup>26</sup> Haywood v. Lincoln Lumber Co. (1885), 64 Wis. 639, citing Corbett v. Woodward, 5 Sawyer, 403; Koehler v. Black River, etc. Co., 2 Black, 715; Hoyle v. Pittsburgh, etc. R. Co. (1873), 54 N. Y. 314, 13 Am. Rep. 595; Butts v. Wood, 38 Barb. 188; Cumberland, etc. Co. v. Sherman, 30 Barb. 553; Scott v. De Peyster, 1 Edw. Ch. 513; Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. 85; European, etc. R. Co. v. Poor, 59 Me. 277; Cook v. Berlin, etc. Co., 43 Wis. 434; *In re Taylor Orphan Asylum*, 36 Wis. 552; Pickett v. School District, 25 Wis. 553; Walworth Co. Bank v. Farmers', etc. Co., 16 Wis.

629; Great Luxemburgh Ry. Co. v. Magnay, 25 Beav. 586. See *contra*, Warfield v. Marshall, etc. Co. (1887), 72 Iowa, 666, 2 Am. St. Rep. 461.

<sup>27</sup> Haywood v. Lincoln Lumber Co. (1885), 64 Wis. 639; Curran v. Arkansas, 15 How. 306; Drury v. Cross, 7 Wall. 299; Bradley v. Farwell, 1 Holmes, 433; Marr v. Bank of Tennessee (1867), 4 Coldw. 471, 484; Richards v. New Hampshire Ins. Co., 43 N. H. 263; Paine v. Lake Erie, etc. Co. (1869), 31 Ind. 353; Gas-Light Co. v. Terrell, L. L. R. 10 Eq. Cas. 168.

<sup>28</sup> Regina v. Reed, L. R. 6 Ch. 87. Accordingly if the borrowing powers of the company are exceeded it is not liable, as persons dealing with it are bound to know that it has not necessarily an unrestricted power of borrowing. Chapleo v. Brunswick Building Society, 6 Q. B. Div. 713; Ashbury, etc. Co. v. Riche, L. R. 7 H. of L. 653, where Lord Selborne said: "I think that contracts for objects and purposes foreign to or inconsistent with the memorandum of association are *ultra vires* of the corporation itself. And it seems to me far more accurate to say that the inability of such companies to make such contracts rests on an original lim-

however, the objects for which the company is established render it reasonably necessary that it should borrow money and mortgage property therefor, it will have power so to do. Thus, as a rule, no doubt, trading companies would have power to borrow; although in practice the question does not very often arise, as it is usual to insert express power to borrow in the memorandum of association.<sup>29</sup> The limits and manner of borrowing, to which a corporation is restricted by its charter or act of incorporation, must be strictly observed.<sup>30</sup> Accordingly authority to mortgage for the purpose of carrying on its business does not confer the power to do so for any other purpose.<sup>31</sup> And the grant to a railway company of the general power to borrow money and to sell bonds at a rate below par, and to execute a mortgage to secure the same, does not authorize it to issue irredeemable bonds at a rate much below par, entitling the holder merely to a contingent share in the profits, nor to execute a mortgage to secure the bonds.<sup>32</sup> But a mortgage to secure a debt, in excess of the amount limited by the charter, has been held not invalid.<sup>33</sup> So also where a debt of a corpora-

itation and circumscription of their powers by the law and for the purposes of their incorporation, than that it depends upon some expressed or implied prohibition making acts unlawful which otherwise they would have had a legal capacity to do."

<sup>29</sup> *In re Hamilton's, etc. Works*, 12 Ch. Div. 707. In the case of *In re Patent File Company, Ex parte Birmingham Banking Company*, 6 Ch. App. 87, the following passages occur in the judgments of Lords Justices James and Melville respectively: "The company is a body corporate, and by the law of England a body corporate can hold property and dispose of it as freely as an individual, unless it is specially prohibited from so doing." . . . "It was urged that no company can mortgage unless expressly authorized to do so. Now, the company has property which it is authorized to deal with, and I should say that the true rule is just the contrary, namely, that the company can mortgage unless expressly prohib-

ited from doing so. The 43d section of the act appears to recognize the creation of mortgages as an ordinary incident to a company." As observed by Lord Justice Cotton in *Regina v. Reed*, 5 Q. B. Div. 486, that was the case of a trading corporation which may have the power to borrow or to mortgage its property for the purpose of enabling it to carry on its trade.

<sup>30</sup> *Baroness Wenlock v. River Dee Co.*, L. R. 10 App. Cas. 354.

<sup>31</sup> *Astor v. Westchester Gas Light Co.*, 33 Hun, 333; *Grand Junction R. Co. v. Bickford*, 23 Grant's Ch. (Ont.) 302; *Miller v. New York, etc. R. Co.*, 18 How. Pr. 374.

<sup>32</sup> *McCalmont v. Philadelphia, etc. R. Co.* (1881), 7 Fed. Rep. 386, 3 Am. & Eng. R. Cas. 163.

<sup>33</sup> *Warfield v. Marshall, etc. Co.* (1887), 72 Iowa, 666, 2 Am. St. Rep. 263; *Garrett v. Burlington Plow Co.*, 70 Iowa, 667, 59 Am. Rep. 461; *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516.

ration beyond the limit prescribed by its charter, was owned by its directors, and they in good faith took a mortgage on the property of the corporation as security, it was held that they might enforce their security, even though they participated in the management of the corporate business in such a way as to permit the accumulation of the debt beyond the allowed limit, and although the corporation was insolvent when the mortgage was taken, and the mortgage gave them a preference over other creditors.<sup>34</sup> A contractor, who has received debenture stock beyond the amount the company was authorized to issue, was held to be entitled to rely upon the implied warranty of the company's authority to issue the stock.<sup>35</sup> Where debenture holders under a statute are entitled *pari passu*, one can not obtain an advantage over the others by means of an additional mortgage.<sup>36</sup> A corporation is estopped from setting up the defense of *ultra vires* to its mortgage contract, when there is nothing on the face of the paper showing that it had exceeded its power.<sup>37</sup> And the doctrine of subsequent legislative recognition applies to the making of corporate mortgages as well as to other corporate acts.<sup>38</sup> The execution of a mortgage which is *ultra vires* on account of being made to secure irredeemable perpetual bonds, may be enjoined at the instance of a stockholder.<sup>39</sup> But a general creditor of a corporation can not obtain an injunction against its executing a mortgage of its property.<sup>40</sup> A railroad or other

<sup>34</sup> *Garrett v. Burlington Plow Co.* (1866), 70 Iowa, 697, 59 Am. Rep. 461, citing *Buell v. Buckingham*, 16 Iowa, 284; *Farmers', etc. Bank v. Wasson*, 48 Iowa, 336, 30 Am. Rep. 398; *Hallam v. Indianola Hotel Co.*, 56 Iowa, 178.

<sup>35</sup> *Fairbank v. Humphreys* (1886), 18 Q. B. Div. 54.

<sup>36</sup> *De Winton v. Brecon* (1858), 26 Beav. 533.

<sup>37</sup> *Hays v. Galion, etc. Co.* (1876), 29 Ohio St. 330; *Bissell v. Michigan, etc. R. Co.*, 22 N. Y. 258; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Singer v. St. Louis, etc. Ry. Co.*, 6 Mo. App. 427.

<sup>38</sup> *Whitewater, etc. Canal Co. v. Vallette* (1858), 21 How. 414; *Shaw v. Norfolk County R. Co.*, 5 Gray, 162; *Shepley v. Atlantic,*

*etc. R. Co.* (1867), 55 Me. 395; *Troy, etc. R. Co. v. Boston, etc. R. Co.*, 86 N. Y. 107; *Richards v. Merrimac, etc. R. Co.*, 44 N. H. 127; *Hatcher v. Toledo, etc. R. Co.* (1871), 62 Ill. 477; *Gardner v. London, etc. Ry. Co.* (1866), L. R. 2 Ch. App. 201; *Shrewsbury, etc. Ry. Co. v. Northwestern Ry. Co.*, 6 H. L. 113; *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 775; *Winch v. Birkenhead, Ry. Co.*, 5 De Gex & S. 562; *Bagshaw v. Eastern Union Ry. Co.*, 7 Hare, 114; *Northern Ry. Co. v. Eastern Counties Ry. Co.*, 21 L. J. Ch. 8.

<sup>39</sup> *McCalmont v. Philadelphia, etc. R. Co.* (1881), 7 Fed. Rep. 386.

<sup>40</sup> *Rogers v. Michigan, etc. R. Co.*, 28 Barb. 539. But the creditors have their remedy against the directors executing an *ultra vires*

*quasi* corporation can not mortgage its property and franchises without express legislative authority and consent of the shareholders.<sup>41</sup>

**§ 1168. Shareholders' consent, when required. Corporation as a shareholder.**—Under an act authorizing manufacturing corporations to mortgage their property upon obtaining the assent of the owners of two-thirds of the stock, the assent of the corporation in behalf of shares owned by it, can not be considered in making up the two-thirds.<sup>42</sup> Where the assent of a majority of the stockholders is necessary, it can not be expressed separately and privately to a person who goes around among them, nor in any other way than at a meeting of the stockholders.<sup>43</sup> The corporators, and no one else, can raise objections to proceedings under acts restricting the power of the directors to mortgage.<sup>44</sup> And even the shareholders will be estopped from pleading their non-consent when a mortgage has been executed and issued by the directors and the company has received the proceeds thereof.<sup>45</sup> If the borrowing powers of the directors only, as distinguished from those of the company, are exceeded, the company can ratify the transaction, and that without altering its articles of association.<sup>46</sup>

**§ 1169. What amounts to a mortgage. Mortgage by an insolvent.**—In order to create the mortgage *lien*, no peculiar form of instrument is necessary. Thus a trust deed is in legal effect a mortgage.<sup>47</sup> And car trust agreements for the purchase

mortgage. *Fairbank v. Humphreys* (1886), 18 Q. B. Div. 54; *Chapleo v. Brunswick, etc. Soc.*, 6 Q. B. Div. 696; *Richardson v. Williamson*, L. R. 6 Q. B. 276; *Weeks v. Propert*, L. R. 8 C. P. 427. Cf. *Rashdell v. Ford*, 2 Eq. 750.

<sup>41</sup> *Daniels v. Hart* (1875), 118 Mass. 543.

<sup>42</sup> But shares transferred by the corporation as collateral security for a debt can not be so deducted, although the assignment be absolute on its face. *Vail v. Hamilton*, 85 N. Y. 453.

<sup>43</sup> *Duke v. Markham* (1890), 105 N. C. 131.

<sup>44</sup> *Thomas v. Citizens'*, etc. R. Co. (1882), 104 Ill. 462; *Beecher v. Marquette*, etc. Co., 45 Mich. 103; *Harvey v. Illinois Midland Ry. Co.*, 28 Fed. Rep. 169.

<sup>45</sup> *Hadder v. Kentucky, etc. R. Co.*, 7 Fed. Rep. 793; *Texas, etc. Ry. Co. v. Gentry* (1888), 69 Tex. 625; *McCurdy's Appeal*, 65 Pa. St. 290. *Contra*, where the bonds were in the hands of holders with notice. *City of Chicago v. Cameron* (1887), 120 Ill. 447.

<sup>46</sup> *Irvine v. Union Bank of Australia*, 2 App. Cas. 266; *Grant v. United Kingdom Switchback Railway Company*, 40 Ch. Div. 135. Vide *supra*, § 559, SHAREHOLDERS' CONSENT.

<sup>47</sup> *Whitewater, etc. Canal Co. v. Vallette*, 21 How. 414; *McLane v. Placerville, etc. R. Co.*, 66 Cal. 606; *Coe v. McBrown*, 22 Ind. 252; *Coe v. Johnson*, 18 Ind. 218. Trust deeds for securing debentures are not so common as they used to be in England, partly, no doubt, be-

of rolling-stock by instalments, regarded as rental only upon forfeiture according to the condition of the contract, are held to constitute mortgages.<sup>48</sup> So also where bonds are expressly made a lien upon the property of the company issuing them, either by statute or stipulation contained in them, a formal mortgage or writing additional to the bonds, is unnecessary.<sup>49</sup> And, if a statute be clear and explicit, in creating a lien of this character,<sup>50</sup> it is not necessary that the bonds should make any mention of the statute.<sup>51</sup> Bonds of this character cover all property,<sup>52</sup> presently owned or after-acquired,<sup>53</sup> and must be foreclosed to become available, in the manner provided by the statute,<sup>54</sup> in all respects as a general mortgage lien. But notes given for money borrowed to pay interest on railroad bonds, each of which stipulates that a certain amount of the gross earnings of the road from date "is pledged in liquidation of this note," are not thereby given priority over the

cause their advantages are not very obvious, and partly because if they include chattels they must comply with the provisions of the Bills of Sale Act of 1882, 45 & 46 Vic. ch. 43, on the ground that such a deed is not a debenture within the meaning of section 17 of that act. *Brocklehurst v. Railway Printing and Publishing Co.*, Week. Notes 1884, p. 70, and *Ross v. Army & Navy Hotel Co.*, 34 Ch. Div. 53. The fact that the trustees of the deed can enter and execute their powers without resort to an action in the Chancery Division is an advantage more apparent than real, as few trustees would incur the responsibility of putting in force the powers of such deed without the direction of the court. Even when meetings of debenture holders are intended to be held, there seems to be no sufficient reason why provisions for that purpose should not be inserted in the conditions of the debentures themselves, and there are cases in which that has been done. "Debentures," reprinted from the *Law Times*, London (1890), 8 Ry. & Corp. L. J. 518.

<sup>48</sup> *Heryford v. Davis* (1880), 102

U. S. 235; *Hervey v. Rhode Island, etc. Works*, 93 U. S. 664; *Frank v. Denver, etc. Ry. Co.*, 23 Fed. Rep. 123. Cf. *Fosdick v. Schall* (1878), 99 U. S. 235, 251; and on Car Trust Securities generally, see paper by Francis Rawle, 8 Am. Bar Assn. Rep. 277; *Yorkshire Ry. Wagon Co. v. Maclure*, 21 Ch. Div. 309; *North Central Wagon Co. v. Manchester, etc. Ry. Co.*, 35 Ch. Div. 191.

<sup>49</sup> *White Water, etc. Canal Co. v. Vallette* (1858), 21 How. 414; *Ketchum v. Pacific R. Co.*, 4 Dill. 78, 86; *Wilson v. Boyce*, 92 U. S. 320; *Woodson v. Murdock*, 22 Wall. 351; *Murdock v. Woodson*, 2 Dill. 539; *Milleer v. Rutland, etc. R. Co.* (1863), 36 Vt. 452; *State v. Florida, etc. R. Co.*, 15 Fla. 690.

<sup>50</sup> *Cincinnati v. Morgan* (1865), 3 Wall. 275; *Brunswick, etc. R. Co. v. Hughes*, 52 Ga. 557; *Collins v. Central Bank*, 1 Kelly, 435.

<sup>51</sup> *Dundas v. Desjardins*, 17 Grant (U. C.), 27.

<sup>52</sup> *Wilson v. Boyce*, 92 U. S. 320.

<sup>53</sup> *Whitehead v. Vineyard*, 50 Mo. 30.

<sup>54</sup> *Florida v. Anderson*, 91 U. S. 667.

bonded debt, as the stipulation is ineffectual.<sup>55</sup> And a contract between two railroad companies in relation to the carriage of freights and division of earnings, which provides that this "contract, and any damages for the breach of the same, shall be a continuing lien upon the roads of the two contracting companies, their equipment and income, in whosesoever hands they may come,"—does not constitute a lien or obligation running with the land, so as to render it liable, in the hands of a purchaser of one of the roads, for supposed earnings that would have accrued during the term provided in the lease.<sup>56</sup>

*Mortgage by an insolvent.*—A mortgage is invalid when given to secure money lent at the time, to an insolvent corporation, or to one contemplating insolvency, if the mortgagee have notice or knowledge of the insolvency existing or contemplated.<sup>57</sup> An equitable mortgage may be made where bond and mortgage is in one instrument like an English debenture and recorded as a mortgage.<sup>58</sup>

*Statutory mortgage.*—The statute may create a mortgage evidenced by no corporate writing.<sup>59</sup> A corporation having leased its property for a hundred years may then give a mortgage for its reversionary interest.<sup>60</sup> A corporation may give a mortgage for a period continuing beyond its term of corporate existence.<sup>61</sup>

**§ 1170. Formal requisites of a corporate mortgage, or deed of trust.**—A corporate mortgage is now usually made in the form of a deed of trust, and under authority of a vote of the board of directors. It is usually required to be signed by the president, and countersigned by the secretary or treasurer, and sealed with the corporate seal.<sup>62</sup> It should be sealed and acknowledged, in like form as a corporate conveyance of land. If not sealed with

<sup>55</sup> *McIlhenny v. Binz* (1890), 80 Tex. 1, 13 S. W. Rep. 655.

<sup>56</sup> *Des Moines & Ft. D. R. Co. v. Wabash, St. L. & P. R. Co.* (1890), 155 U. S. 576, 8 Ry. & Corp. L. J. 84.

<sup>57</sup> *Regina, etc. Co. v. Otta, etc.* (N. J. 1903), 56 Atl. 715.

<sup>58</sup> *White Water, etc. Co. v. Vallette* (1858), 21 How. 414.

<sup>59</sup> *Cunningham v. Macon, etc. R. R.* (1895), 156 U. S. 400.

<sup>60</sup> *First National Bank v. Sioux City, etc. Co.* (1895), 69 Fed. 441.

<sup>61</sup> *Detroit v. Detroit, etc. Ry.* (1902), 184 U. S. 368.

<sup>62</sup> *Vide supra*, §§ 104, 862, MODE OF SEALING AND EXECUTION; *Galveston, etc. R. Co. v. Cowdrey* (1870), 11 Wall. 459; *Duke v. Markham* (1890), 105 N. C. 131; *Ohio, etc. R. Co. v. McPherson*, 35 Mo. 13, 86 Am. Dec. 128; *Wright v. Bundy*, 11 Ind. 398; *Arms v. Conant*, 36 Vt. 744; *McCurdy's Appeal*, 65 Pa. St. 290; 8 Vic. ch. 16, § 41; *Londoners', etc. Co. v. Ashford*, 16 Ch. Div. 411; *In re Bagnalstown, etc. Ry. Co., Ir. Rep.* 4 Eq. 505.

the corporate seal, where that is requisite, it may be enforced as an equitable mortgage.<sup>63</sup> Where the mortgagor's attorney delivers mortgage to the trustee who returns it to him to be recorded, that constitutes a delivery.<sup>64</sup> Thus a mortgage signed by the president, secretary and two stockholders, and duly witnessed, but not sealed with the common seal of the corporation as required by the statute, is ineffectual.<sup>65</sup> The mortgage and the bonds may be validly executed out of the State in which the company's property is situated,<sup>66</sup> although with respect to the forms of conveyance, a mortgage of realty should be executed according to the law of the State where it lies.<sup>67</sup> The law of the State creating the corporation governs as to the authority of the corporate agents to act.<sup>68</sup> The mortgage deed should describe specifically and accurately the bonds which it is given to secure.<sup>69</sup> But a mortgage given by a railroad company to secure the payment of dividends to the holders of certificates purporting to be certificates of preferred stock, is an incident to the principal obligation; and the terms and purport of the certificates express the real intent of the parties, even though some of the stipulations of the mortgage may be apparently inconsistent with the intent as expressed by the certificates.<sup>70</sup> A mortgage deed may be reformed by a court of equity, so as to carry out the evident intent of the parties.<sup>71</sup> And a defective mortgage, which could not operate as a deed, has been held to be an equitable mortgage, taking precedence over second mortgagees affected with notice of the former.<sup>72</sup>

**§ 1171. Mortgage trustees. Eligibility and duties.**—The deed of trust is substantially a mortgage, and subject to the same

<sup>63</sup> *Brown v. Farmers', etc. Co.* (1893), 23 Oreg. 541, 32 Pac. 548; *Pullis v. Pullis Bros.* (1900), 157 Mo. 565.

<sup>64</sup> *First National Bank v. G. V. B. Min. Co.* (1892), 89 Fed. 439; *In re Goldville, etc. Co.* (1902), 118 Fed. 892.

<sup>65</sup> *Duke v. Markham* (1890), 105 N. C. 131.

<sup>66</sup> *Hervey v. Illinois Midland Ry. Co.*, 28 Fed. Rep. 169; *Hadder v. Kentucky, etc. R. Co.*, 7 Fed. Rep. 793.

<sup>67</sup> *Saltmarsh v. Spaulding*, 147 Mass. 224 (1888).

<sup>68</sup> *Saltmarsh v. Spaulding*, 147 Mass. 224 (1888), where a stat-

ute in Massachusetts prohibiting directors from mortgaging the corporate property without authority from the stockholders, was held not to apply to a mortgage of property situated in Massachusetts, owned by a corporation deriving its charter from Vermont.

<sup>69</sup> *Butler v. Rahm*, 46 Md. 541.

<sup>70</sup> *Miller v. Ratterman* (Ohio, 1890), 47 Ohio St. 141.

<sup>71</sup> *Coe v. New Jersey, etc. R. Co.* (1879), 31 N. J. Eq. 105; *Randolph v. New Jersey, etc. R. Co.*, 28 N. J. Eq. 49.

<sup>72</sup> *Miller v. Rutland, etc. R. Co.* (1863), 36 Vt. 452.

rules of law. Instead of a director's mortgage, it is made to one or more trustees to secure all the bondholders, however numerous. The trustee may be an officer of the corporation; or a stockholder, although he holds a majority of the stock.<sup>73</sup> Citizens of other States may be trustees.<sup>74</sup> He generally subscribes to the mortgage his acceptance of the trust, and endorses his certificate on bond, that it is secured by the mortgage, and if he so certifies the bonds he is liable to any holder for negligence in recording the mortgage, where a subsequent mortgagee, duly recorded, gains priority over the first.<sup>75</sup> It is usual to constitute several trustees jointly, so that upon the death or incapacity of one or more of them their interests vest in the survivor or survivors.<sup>76</sup> The trustees generally have no active duty, until some default occurs in the payment of interest upon the bonds secured.<sup>77</sup> But they may be allowed to participate in the election of directors of the company if the deed so provides.<sup>78</sup> Where the trustee has the voting power the bondholders can not control its discretion.<sup>79</sup> The trustee can not for himself buy in the property on its sale where he has no personal interest.<sup>80</sup> Until the bonds are sold he is trustee only for the mortgagee, and subject to his directions.<sup>81</sup> Although there be no default in payment of interest, the trustee's duty, in case of act of peril to the security of the bonds, is to apply to the court for injunction against any such act; as to restrain railroad commissioners from ruinous reduction of railroad rates.<sup>82</sup> The bondholders are bound by the trustee's acts in foreclosure proceedings, unless *ultra vires*.<sup>83</sup> A court of equity may remove and appoint new

<sup>73</sup> Hanchett v. Blair (1900), 100 Fed. 817.

<sup>74</sup> Roby v. Smith (1892), 131 Ind. 342, 15 L. R. A. 792, 31 Am. St. Rep. 439.

<sup>75</sup> Miles v. Vivian, 79 Fed. 848 (1897).

<sup>76</sup> McAllister v. Plant, 54 Miss. 106; Farmers' Loan & Trust Co. v. Hughes, 11 Hun, 130. The statutes or the deeds themselves frequently provide for supplying vacancies. Fletcher v. Rutland, etc. R. Co., 39 Vt. 633; Shaw v. Nor-folk, etc. R. Co., Gray, 162; Richards v. Merrimac, etc. R. Co., 44 N. H. 127. Whether a foreign trust company may act as a mortgage trustee, see Beach on Railways, § 627, citing Farmers' Loan

& Trust Co. v. Chicago, etc. Ry. Co., 27 Fed. Rep. 146; Hervey v. Illinois Midland Ry. Co., 28 Fed. Rep. 169.

<sup>77</sup> Jones on Corporate Bonds and Mortgages, § 287.

<sup>78</sup> New England, etc. Ins. Co. v. Phillips (1886), 141 Mass. 535.

<sup>79</sup> Toler v. East Tennessee, etc. Ry. Co. (1894), 67 Fed. 168.

<sup>80</sup> Brewer v. Harrison, 27 Colo. 349 (1900).

<sup>81</sup> Penninsular Iron Co. v. Ellis (1895), 68 Fed. 24.

<sup>82</sup> Mercantile T. Co. v. Texas, etc. Ry. Co. (1892), 51 Fed. 529.

<sup>83</sup> Farmers' etc. Co. v. Kansas City, etc. Ry. Co. (1892), 53 Fed. 182.

trustees in a mortgage.<sup>84</sup> A trustee can not resign his trusteeship without acceptance.<sup>85</sup> Trustees are sometimes burdened with the duty of superintending the disbursement of the moneys borrowed upon the mortgage.<sup>86</sup> In case no duties of this nature are imposed upon them, their first active business is, upon breach of the conditions of the mortgage, to enter and take possession of the property and sell it, or to institute proceedings of foreclosure.<sup>87</sup> When they have entered upon the property and are managing it, they become vested with the rights and subject to the liabilities of the corporation itself.<sup>88</sup> Although trustees usually retain their positions until discharged at the termination of the trust,<sup>89</sup> they may be removed and their successors appointed by a court of equity.<sup>90</sup> They are entitled to remuneration for their services, the amount thereof being usually determined by the court and payable out of the proceeds of the mortgaged property.<sup>91</sup>

**§ 1172. Trustees as receivers.**—The position and duty of a trustee in possession, are practically those of a receiver.<sup>92</sup> And in a California case, the trustee, being entitled to possession under the terms of the mortgage, was appointed receiver by the court, that he might more effectually carry out and complete the trust delegated

<sup>84</sup> *In re Anson* (1892), 85 Me. 79.

<sup>85</sup> *Richards v. Merrimac, etc. R. Co.* (1862), 44 N. H. 127.

<sup>86</sup> *Banque Franco-Egyptienne v. Brown*, 34 Fed. Rep. 162.

<sup>87</sup> *Sturgis v. Knapp*, 31 Vt. 1. And they may subject themselves to personal liability to the bondholders by failing to preserve the rights of their *cestui que trust*. *Ricker v. Alsop*, 27 Fed. Rep. 251. Although if it is provided that after default it shall be the duty of the trustees to take these steps "upon the written request of the holders of a majority of the bonds outstanding," they have no authority to proceed until the request be made. *Chicago, etc. R. Co. v. Fosdic*, 106 U. S. 47; *Union Trust Co. v. Missouri, etc. Ry. Co.*, 26 Fed. Rep. 485.

<sup>88</sup> Jones on Corporate Bonds and Mortgages, § 307; *Daniels v. Hart*, 118 Mass. 543; *Stratton v. European, etc. Ry. Co.*, 76 Me. 269;

*Wilkinson v. Fleming*, 30 Ill. 353; *Palmer v. Forbes*, 23 Ill. 301.

<sup>89</sup> *Knapp v. Railroad Co.*, 20 Wall. 117.

<sup>90</sup> *Ketchum v. Mobile, etc. R. Co.* 2 Woods, 532; *Beadleston v. Knapp*, 13 Abb. Pr. 335; *North Carolina R. Co. v. Wilson*, 81 N. C. 223; *Farmers' Loan & Trust Co. v. McHenry*, 9 Abb. N. C. 235.

<sup>91</sup> *Williams v. Morgan*, 111 U. S. 684.

<sup>92</sup> *McLane v. Placerville, etc. R. Co.* (1885), 66 Cal. 606, 617; *Rensselaer, etc. R. Co. v. Miller*, 47 Vt. 152; *Wood v. Goodwin*, 49 Me. 260, 77 Am. Dec. 259; *Ashuelot R. Co. v. Elliott* (1874), 59 N. H. 397; *Duncan v. Mobile, etc. R. Co.*, 2 Woods, 542, holding that, as their primary duty is to protect the rights of their own bondholders, they cannot consent to the payment of other claims until their own bondholders have been paid or secured.

to him by the mortgage.<sup>93</sup> But as they can not consult the entire body of the bondholders, and as their duty is to each one severally, they are not at liberty to follow the advice or wishes of the majority, being still liable to the minority for a faithful administration of their trust.<sup>94</sup>

**§ 1173. The mortgage does not include the franchise of being a corporation.**—The statute under which a corporate mortgage is made, with the intention of the parties to the deed, determine what property is covered thereby.<sup>95</sup> The franchise of being a corporation, however, is not included in a mortgage of the property and franchise of a company, unless by positive provision of law.<sup>96</sup> A railroad can not mortgage its franchises and railroad without express authority of the legislature.<sup>97</sup> A mortgage does not cover the corporate franchise.<sup>98</sup> A purchaser of a railroad at a foreclosure sale does not succeed to any corporate franchise, but only to the right to operate the road and collect tolls.<sup>99</sup> The franchise of being a corporation belongs to the corporators. The corporation has no power to dispose of it, though it may part with all its property. The franchise of corporate existence survives to the corporators, or is surrendered to the State.<sup>1</sup> And in general, while the mortgage is to be construed with reference to the statute, the words of description in the deed will not be extended beyond those in the enabling act.<sup>2</sup> Specific descriptions and enumerations are construed to be exclusive.<sup>3</sup> But if the statute confer the power to mortgage all the corporate property, general terms unrestricted in the deed will cover the whole property of the corporation.<sup>4</sup> General terms, however, when connected with or allied in meaning to phrases most aptly describing property in use by the corporation or necessary to its business, will not pass property, especially land, which is not connected with its regular and legitimate operations.<sup>5</sup> Courts strictly construe a mortgage by a railroad corpora-

<sup>93</sup> McLane v. Placerville, etc. R. Co. (1885), 66 Cal. 606, 614.

<sup>94</sup> Sturgis v. Knapp (1858), 31 Vt. 1.

<sup>95</sup> Wilson v. Gaines, 103 U. S. 417.

<sup>96</sup> Memphis, etc. R. Co. v. Berry, 112 U. S. 608; New Orleans, etc. R. Co. v. Delaware, 114 U. S. 296.

<sup>97</sup> Daniels v. Hart (1875), 118 Mass. 543.

<sup>98</sup> City Water Co. v. State, 88 Tex. 600 (1895), 32 S. W. 1033.

<sup>99</sup> Rogers v. Nashville, etc. R. R. (1898), 91 Fed. 299.

<sup>1</sup> Memphis R. R. Co. v. Railroad Comm'r's (1884), 112 U. S. 609.

<sup>2</sup> Wilson v. Gaines, 103 U. S. 417; Coe v. Midland, etc. R. Co. (1879), 31 N. J. 105.

<sup>3</sup> Smith v. McCullough, 104 U. S. 25; Brainerd v. Peck, 34 Vt. 496.

<sup>4</sup> Coe v. Midland, etc. R. Co., 31 N. J. Eq. 105 (1879).

<sup>5</sup> Alabama v. Montague, 117 U. S. 602 (1885); Shamokin Valley

tion, since upon its foreclosure, unsecured creditors rarely realize anything. The mortgage is held to cover only such land and other property as is essential to the performance of the company's duties to the public, in the construction, equipment and regular operation of its road.<sup>6</sup>

**§ 1174. When It covers choses in action.**—A mortgage of "all the property" does not embrace choses in action unless specifically mentioned.<sup>7</sup> "Choses in action include the infinite variety of contracts, covenants and promises, which confer on one party the right to a personal chattel or sum of money from another, by action."<sup>8</sup> A purchaser at a foreclosure sale of corporate property does not acquire title to its choses in action, unless they are described with sufficient particularity to be identified.<sup>9</sup>

*Specific property not included in the mortgage.*—"Undertaking," "debenture," "going concern." The word "undertaking," found in English mortgages, has a meaning entirely restricted to the "going concern" created by the act of incorporation.<sup>10</sup> For, as a rule, mortgage debentures are made floating securities, so as not to interfere with the company's ordinary business operations; and a debenture of that kind will not prevent the company from giving specific charges upon portions of its assets in priority of the debentures, provided the specific charges are in the ordinary course of business, and for the purposes thereof.<sup>11</sup> And so strong is this rule, that where a debenture trust deed contained a provision that the principal moneys and interest intended to be secured by the debentures should take precedence over all moneys which might

R. Co. v. Livermore (1864), 47 Pa. St. 465, 86 Am. Dec. 552; Youngman v. Elmira, etc. R. Co., 65 Pa. St. 278; Van Keuren v. Central R. Co., 38 N. J. 165; Dinsmore v. Racine R. Co., 12 Wis. 649; Morgan v. Donovan, 58 Ala. 241. Cf. Wilson v. Boyce, 92 U. S. 320; St. Louis, etc. R. Co. v. McGee, 115 U. S. 476; Calhoun v. Memphis, etc. R. Co., 2 Flip. 442; Gardner v. London, etc. R. Co., L. R. 2 Ch. App. 201.

<sup>6</sup> Maxwell v. Wilmington, etc. Co. (1896), 77 Fed. 938; Aldridge v. Pardee (1900), 24 Tex. Civ. App. 254, 60 S. W. 789.

<sup>7</sup> Milwaukee, etc. R. Co. v. Milwaukee, etc. R. Co. (1866), 20 Wis. 174, 22 Am. Rep. 70, n.; Mer-

chants' Bank v. Petersburg R. Co., 12 Phila. 482.

<sup>8</sup> Coler v. Grainger County, 74 Fed. 16 (1896).

<sup>9</sup> General Electric Co. v. Wightman (1896), 3 N. Y. App. Div. 118.

<sup>10</sup> Gardner v. London, etc. R. Co., L. R. 2 Ch. App. 201; Myatt v. St. Helens Ry. Co., 2 Q. B. 364; Hart v. Eastern Union Ry. Co., 7 Ex. 246; King v. Marshall, 33 Beav. 565; *Ex parte* Stanley, 33 L. J. Ch. 535; Moor v. Anglo-Italian Bank, 10 Ch. Div. 681; Legg v. Mathieson, 2 Giff. 71; Wickham v. New Brunswick, etc. Ry. Co., L. R. 1 P. C. 64.

<sup>11</sup> Wheatley v. Silkstone, etc. Co., 29 Ch. Div. 715.

thereafter be raised by the company by any means whatsoever, it was held that the company could mortgage specific property not comprised in the deed, so as to give the mortgage priority over the debentures.<sup>12</sup>

**§ 1175. Mortgage covers rolling-stock.**—Though there is great conflict of decisions, the tendency of the courts is to hold that rolling-stock of a railroad is realty, as much so as the track itself.<sup>13</sup> The rolling-stock is included in a mortgage of all the property, whether specified or not;<sup>14</sup> and is subject to the mortgage, in whatever State the rolling-stock goes.<sup>15</sup>

**§ 1176. Mortgage covers after-acquired property.**—The mortgage may cover property acquired by the corporation subsequent to giving the mortgage. Public policy has established this rule, especially in behalf of railroads and other public enterprises. The mortgage is held to become a lien upon the property the moment it is acquired.<sup>16</sup> But the mortgage does not cover after-acquired property unless clearly so stated.<sup>17</sup> Such a mortgage will cover new branch lines and extensions of a railroad and other railroad lines purchased by the corporation.<sup>18</sup> By express words of futurity, a corporation may validly mortgage property to be subsequently acquired.<sup>19</sup> When such words are used, future acquisitions of property, whether corporeal or incorporeal, are included.<sup>20</sup> And when property is afterward acquired, the lien of the mortgage attaches instantly, as effectually as if it had been particularly described.<sup>21</sup> But, as in the case of general descriptive language,

<sup>12</sup> *Buzzard v. Threlfalls Brewery Co.*, 88 L. T. 396.

<sup>13</sup> *Farmers' etc. Co. v. St. Joseph, etc. Ry. Co.* (1875), 3 Dill. 412.

<sup>14</sup> *State v. Northern Central Ry. Co.* (1861), 18 Md. 193.

<sup>15</sup> *Nichols v. Mase* (1881), 25 Hun, 640.

<sup>16</sup> *Bear Lake Irr. Co. v. Garland* (1896), 164 U. S. 1.

<sup>17</sup> *Maxwell v. Wilmington, etc. Co.* (1896), 77 Fed. 938.

<sup>18</sup> *Central T. Co. v. Kneeland* (1891), 138 U. S. 414; *Galveston R. R. v. Cowdrey* (1870), 11 Wall. 459; *Branch v. Jessup* (1882), 106 U. S. 468.

<sup>19</sup> *Dunham v. Cincinnati, etc. R. Co.* (1863), 1 Wall. 254; *Coney v. Pittsburgh, etc. R. Co.*, 3 Phila.

173; *Coopers v. Wolf*, 15 Ohio St. 523; *Ludlow v. Hurd*, 1 Disn. 552; *In re General South American Co.*, 2 Ch. Div. 337; *In re Panama, etc. Mail Co.*, 5 Ch. 318; *Willink v. Andrews*, 16 Ir. R. C. L. 201.

<sup>20</sup> *Williamson v. New Jersey, etc. R. Co.*, 26 N. J. Eq. 398; *Buck v. Seymour*, 46 Conn. 156; *Texas, etc. Ry. Co. v. Gentry* (1888), 69 Tex. 625.

<sup>21</sup> *Parker v. New Orleans, etc. R. Co.*, 33 Fed. Rep. 693; *Galveston, etc. R. Co. v. Cowdrey*, 11 Wall. 459 (1870); *New Orleans, etc. R. Co. v. Mullen*, 12 Wall. 365; *Scott v. Clinton, etc. R. Co.*, 6 Biss. 535; *Barnard v. Norwich, etc. R. Co.*, 4 Cliff. 365; *Dillon v. Barnard*, 1 Holmes, 394.

a futurity clause will not include property not properly connected with the company's business,<sup>22</sup> or unlawfully acquired.<sup>23</sup> Nor do such clauses in general mortgages create a lien upon calls or unpaid subscriptions to the capital stock of the company.<sup>24</sup> A mortgage of all the property of a company in general terms, embraces future acquisitions even without especial words of futurity,<sup>25</sup> but only of property which the company had the right at the time to acquire.<sup>26</sup> Property acquired after the mortgage, is not covered by it unless by express provision in it, covering after-acquired property.<sup>27</sup>

**§ 1177. When mortgage covers fixtures. What they include.**—As in the case of mortgages by individuals, corporate mortgages of realty carry fixtures as distinguished from personal property.<sup>28</sup> And what constitutes a fixture is determined by the same rules, although the object, the effect and the mode of annexation, must be all taken into consideration.<sup>29</sup> Accordingly, articles which have become affixed to the realty, thereby partaking of its nature, whether acquired before or after the execution of a general mortgage of the real estate of the company, are subject to the lien thereof.<sup>30</sup> To be a fixture there must be actual annexa-

<sup>22</sup> Shamokin Valley R. Co. v. Livermore, 47 Pa. St. 465, 85 Am. Dec. 552; Calhoun v. Paducah, etc. R. Co., 9 Cent. L. J. 66; Mississippi Valley Co. v. Chicago, etc. R. Co., 58 Miss. 896, 38 Am. Rep. 348, 350; Calhoun v. Memphis, etc. R. Co., 2 Flip. 442; United States Trust Co. v. Wabash, etc. R. Co. (1887), 32 Fed. Rep. 480; Seymour v. Canandaigua, etc. R. Co. (1857), 25 Barb. 284; Morgan v. Donovan, 58 Ala. 241; Hamlin v. European, etc. R. Co., 72 Me. 83.

<sup>23</sup> Randolph v. New Jersey, etc. R. Co. (1878), 28 N. J. Eq. 49; Field v. Post, 38 N. J. Eq. 346; Williamson v. New Jersey, etc. R. Co., 28 N. J. Eq. 277; Frazier v. Frederick, 23 N. J. Eq. 162. See Coe v. New Jersey, etc. R. Co. (1879), 31 N. J. Eq. 105.

<sup>24</sup> Dean v. Biggs, 25 Hun, 122; Gardner v. London, etc. Ry. Co., 2 Ch. 201; King v. Marshall, 33 B. 565; *Ex parte* Stanley, 33 L. J. Ch. 535; Moor v. Anglo-Italian Bank, 10 Ch. Div. 681; 8 Vic. ch. 16,

§ 43. But see Pickering v. Ilfracombe Ry. Co., L. R. 3 C. P. 235.

<sup>25</sup> Shaw v. Bill (1877), 95 U. S. 10; Pennock v. Coe, 23 How. 117; Farmers' Loan & Trust Co. v. Commercial Bank, 15 Wis. 465, 82 Am. Dec. 689; Dinsmore v. Racine, etc. R. Co., 12 Wis. 649; Pierce v. Emery (1858), 37 N. H. 410; Ludlow v. Hurd, 1 Disn. 552.

<sup>26</sup> Seymour v. Canandaigua, etc. R. Co. (1857), 25 Barb. 284; Meyer v. Johnston, 53 Ala. 237; Campbell v. Texas, etc. R. Co., 2 Woods, 263.

<sup>27</sup> Thompson v. White, etc. R. R. (1889), 132 U. S. 68.

<sup>28</sup> Southbridge Savings Bank v. Mason (1888), 147 Mass. 500.

<sup>29</sup> Southbridge Savings Bank v. Mason (1888), 147 Mass. 500; Smith Paper Co. v. Servin, 130 Mass. 513; McConnell v. Blood, 123 Mass. 47, 25 Am. Rep. 12; McLaughlin v. Nash, 14 Allen, 136, 92 Am. Dec. 741.

<sup>30</sup> Porter v. Pittsburg, etc. Co., 122 U. S. 267, 283.

tion, application to which the realty has been applied, or annexation with intent that it should be a permanent accession to the realty. Machinery that is firmly attached to a factory and necessary to its use as a factory is a fixture, but whatever is removable without disturbing the building is not a fixture.<sup>31</sup> A mortgage by a corporation of certain land with a factory thereon, carries not all the machinery therein, but only so much thereof as has been so annexed to the realty as to become a part thereof.<sup>32</sup> So also a mortgagee of real estate, devoted to the purposes of a brewery, is entitled only to articles attached to the realty in such a manner as to be regarded as fixtures, whether they be necessary to the successful operation of the particular establishment or not.<sup>33</sup> A mortgage of a factory *eo nomine*, however, includes, *ex vi termini*, all the machinery and other articles to the factory.<sup>34</sup> So, manifestly, a mortgage of lands, factories, machinery and fixtures carries all machines permanently attached to the factory or adapted thereto, whether ever actually used or not.<sup>35</sup> But the placing of the wires of one telegraph company upon the poles of another, by an agreement giving that privilege for a rent to be paid, does not make them fixtures of the company owning the poles, so as to be covered by its mortgage.<sup>36</sup> Electric lighting apparatus attached to mortgaged property becomes no part of the realty.<sup>37</sup> A dynamo, screwed to timbers spiked to the floor, becomes a fixture.<sup>38</sup> Furniture in offices and places of business is not regarded as fixtures;<sup>39</sup> nor is fuel;<sup>40</sup> nor are tools and implements not attached to the

<sup>31</sup> Knickerbocker T. Co. v. Penn. etc. Co. (1901), 62 N. J. Eq. 624.

<sup>32</sup> Rogers v. Prattville Manuf. Co., 81 Ala. 483.

<sup>33</sup> Penn, etc. Ins. Co. v. Semple (1884), 38 N. J. Eq. 575.

<sup>34</sup> Delaware, etc. R. Co. v. Oxford Iron Co. (1883), 36 N. J. Eq. 452; Potts v. New Jersey Arms Co. (1865), 17 N. J. Eq. 395; Voorhis v. Freeman, 2 Watts & S. 116; Pyle v. Pennock, 2 Watts & S. 390; Teaff v. Hewitt, 1 Ohio St. 511; Ewell on Fixtures, 308.

<sup>35</sup> Delaware, etc. R. Co. v. Oxford Iron Co. (1883), 36 N. J. Eq. 452.

<sup>36</sup> Farnsworth v. Western, etc. Co. (1889), 25 N. Y. St. Rep. 393, 6 Ry. & Corp. L. J. 284; Porter v. Steel Co. (1887), 122 U. S. 267,

283; United States v. Railroad Co., 12 Wall. 362; Telegraph Co. v. Middleton, 80 N. Y. 408; Trustees v. Wheeler, 61 N. Y. 88, 118; Tiff v. Horton, 53 N. Y. 377; Railway Co. v. Telegraph Co., 36 Hun, 205.

<sup>37</sup> New York, etc. Co. v. Allison (1901), 107 Fed. 179.

<sup>38</sup> Gunderson v. Swarthout (1899), 104 Wis. 186, 76 Am. St. Rep. 860.

<sup>39</sup> Hunt v. Bullock (1860), 23 Ill. 320; Raymond v. Clark, 46 Conn. 129; Ludlow v. Hurd, 1 Disney, 552; Titus v. Mabee, 25 Ill. 257; Lehigh, etc. Co. v. Central R. Co. (1882), 35 N. J. Eq. 379.

<sup>40</sup> Hunt v. Bullock (1860), 23 Ill. 320. *Contra*, Coe v. McBrown, 22 Ind. 252.

realty.<sup>41</sup> Rolling-stock, however, is generally held to be so affixed to a railway as to pass under a general mortgage thereof,<sup>42</sup> unless, of course, owned by other parties.<sup>43</sup> Rails, new or old, destined for use or having been in use, are fixtures of railways.<sup>44</sup> And bridges, rails and all such articles, which become affixed to a railway, are subject to the lien of a mortgage thereon.<sup>45</sup> All questions as to what are fixtures are for the jury, whose findings can not be set aside unless clearly erroneous.<sup>46</sup>

**§ 1178. Mortgage of income.**—Where the corporation mortgages all its property, with pledge of all its income, the mortgagee has a lien on the *corpus* of the property, enforceable upon default, but enforceable as to the income, only upon future income, after the mortgagee has impounded it by appropriate proceedings. His

<sup>41</sup> Lehigh, etc. Co. v. Central R. Co. (1882), 35 N. J. Eq. 379; Williamson v. New Jersey, etc. R. Co., 29 N. J. Eq. 311, 28 N. J. Eq. 277.

<sup>42</sup> Minnesota Co. v. St. Paul Co. (1867), 6 Wall. 142; Milwaukee, etc. R. Co. v. Milwaukee, etc. R. Co., 6 Wall. 742; Milwaukee, etc. R. Co. v. Souter, 2 Wall. 609; Gue v. Tidewater Co., 24 How. 257; Phillips v. Winslow, 18 B. Mon. 431, 68 Am. Dec. 729; Macon, etc. R. Co. v. Parker, 9 Ga. 377; Youngman v. Elmira, etc. R. Co. (1870), 65 Pa. St. 278; Shamokin Valley R. Co. v. Livermore, 47 Pa. St. 465, 85 Am. Dec. 552; Coney v. Pittsburgh, etc. R. Co., 8 Phila. 173; Hamlin v. Jerrard, 72 Me. 62. But in several of the states rolling-stock is held to be personal property. Hoyle v. Plattsburgh, etc. R. Co. (1873), 54 N. Y. 314, 13 Am. Rep. 595; Randall v. Ellwell, 52 N. Y. 521, 11 Am. Rep. 747; Stevens v. Buffalo, etc. R. Co., 31 Barb. 590; Williamson v. New Jersey, etc. R. Co., 29 N. J. Eq. 311, reversing 28 N. J. Eq. 277; Boston, etc. R. Co. v. Gilmore (1858), 37 N. H. 410; Coe v. Columbus, etc. R. Co. (1859), 10 Ohio St. 372, 75 Am. Dec. 518. And in Illinois the state constitution ordains that the rolling-stock of railways shall be deemed per-

sonal property. Scott v. Clinton, etc. R. Co., 6 Biss. 529, where it was held, however, that the general mortgage covered the rolling-stock until attached by creditors.

<sup>43</sup> Hardesty v. Pyle, 15 Fed. Rep. 778. See also Meyer v. Johnston (1875), 53 Ala. 237.

<sup>44</sup> Salem Bank v. Anderson, 75 Va. 250; Lehigh, etc. Co. v. Central R. Co. (1883), 35 N. J. Eq. 379; Wutjen v. St. Paul, etc. Co., 4 Hun, 529; Palmers v. Forbes (1860), 23 Ill. 301. Cf. Farmers' Loan & Trust Co. v. Commercial Bank, 15 Wis. 465, 82 Am. Dec. 689; Farmers' Loan & Trust Co. v. Cary, 13 Wis. 110; Dinsmore v. Racine, etc. R. Co., 12 Wis. 649. Also Brainerd v. Peck, 34 Vt. 496.

<sup>45</sup> Porter v. Pittsburg, etc. Co. (1887), 122 U. S. 267, 283, citing Fosdick v. Schall, 99 U. S. 235, 251; Dillon v. Bernard, 21 Wall. 430, 440; United States v. New Orleans R. C., 12 Wall. 362, 365; Galveston R. Co. v. Cowdrey, 11 Wall. 459, 480, 482; Dunham v. Cincinnati, etc. R. Co., 1 Wall. 254.

<sup>46</sup> Southbridge Savings Bank v. Mason (1888), 147 Mass. 500; Montgomery v. Pickering, 116 Mass. 230; Reed v. Reed, 114 Mass. 372.

right to so impound it, is as well vested against the claims of unsecured creditors, as is his mortgage upon the *corpus* of the property.<sup>47</sup> Although when a general mortgage is paid, it must be out of the income, and the net earnings may be specifically subjected thereto by the mortgagee's taking possession of the property, without words of futurity,—income is not specifically covered by the lien of the mortgage.<sup>48</sup> And so long as the earnings remain in the hands of the company they are subject to attachment by the general creditors,<sup>49</sup> unless specifically made subject to the mortgage lien.<sup>50</sup> When, however, the income of a corporation is specifically mortgaged, as it may be,<sup>51</sup> it is only the net earnings after paying the operating expenses,—that are available, and if gross earnings are diverted to the mortgagees, the general creditors acquire a claim against them.<sup>52</sup> So also an income railway mortgage, although it is a pledge of tangible property for the payment of the principal sum, is, as a security for the payment of interest, but little more than the pledge of the good faith of the company in managing its lines; it necessarily contemplates that such improvements as seem necessary to the efficient use and operation of the

<sup>47</sup> Atlantic T. Co. v. Dana (Kan. 1903), 128 Fed. 209, U. S. C. C. A.

<sup>48</sup> Pullan v. Cincinnati, etc. R. Co. (1873), 5 Biss. 237; Emerson v. European, etc. R. Co. (1877), 67 Me. 387, 24 Am. Rep. 39.

<sup>49</sup> Gilman v. Illinois, etc. R. Co., 91 U. S. 603; Galveston R. Co. v. Cowdrey, 11 Wall. 459; Clay v. East Tennessee, etc. R. Co. (1871), 6 Heisk. 421; Smith v. Eastern R. Co., 124 Mass. 154; Ellis v. Boston, etc. R. Co., 107 Mass. 1; Emerson v. European, etc. R. Co. (1877), 67 Me. 387, 24 Am. Rep. 39; Noyes v. Rich, 52 Me. 115; Bath v. Miller, 51 Me. 341; Mississippi, etc. R. Co. v. United States Ex. Co., 81 Ill. 254; Galena, etc. R. Co. v. Menzies, 26 Ill. 121; Dunham v. Isett, 15 Iowa, 284.

<sup>50</sup> Emerson v. European, etc. R. Co. (1877), 67 Me. 387, 24 Am. Rep. 39; De Graff v. Thompson, 24 Minn. 452. *Of.* Thompkins v. Little Rock, etc. R. Co., 15 Fed. Rep. 6; Addison v. Lewis (1881),

75 Va. 701; Kelly v. Alabama R. Co., 58 Ala. 489.

<sup>51</sup> Rutten v. Union Pac. Ry. Co. (1883), 17 Fed. Rep. 480; Pullan v. Cincinnati, etc. R. Co. (1873), 5 Biss. 237; Barry v. Missouri, etc. Ry. Co., 27 Fed. Rep. 1, 7.

<sup>52</sup> Calhoun v. St. Louis, etc. R. Co., 14 Fed. Rep. 9; Parkhurst v. Northern Central R. Co., 19 Md. 472, 81 Am. Dec. 648. As to who are entitled to rents and profits under a railroad mortgage, see further: Galveston, etc. R. Co. v. Cowdrey, 11 Wall. 459; McCalester v. Maryland, 114 U. S. 605; Fosdick v. Schall (1878), 99 U. S. 253; American Bridge Co. v. Heidelbach, 94 U. S. 800; Gilman v. Illinois, etc. Tel. Co., 91 U. S. 617, 1 McCrary, 173; Young v. Northern Illinois, etc. Co., 9 Biss. 305, 13 Fed. Rep. 809; Gilman v. Illinois, etc. Tel. Co., 1 McCrary, 173; Dow v. Memphis, etc. R. Co., 124 U. S. 652, 20 Fed. Rep. 770; Hay v. Railroad Co., 4 Hughes, 374.

property, and such alterations in the *corpus* as appear desirable, are to be made at the discretion of the directors, and unless it contains some limitations upon the powers of the directors, express or implied, the right of the company to conduct its operations as it may seem fit (subject only to the conditions of its organic law), is unqualified; and consequently, the company can lawfully extend its lines, acquire new ones, discontinue old ones, and thus essentially change the earning capacity of the property.<sup>53</sup> The mortgage intrusts the directors with a wide discretion in determining what is to be treated as net income. Their conclusions, when embodied in a resolution of the board, are not vitiated by an error of judgment, and can only be disturbed when the circumstances establish bad faith.<sup>54</sup> But when the mortgage specifically charges the income of particular lines, their duty to the bondholder requires them to make an honest effort to ascertain the net earnings of the original lines at the several interest periods; and this they can not do practically unless a separate account of the earnings and expenses of those lines are kept.<sup>55</sup> It is important, therefore, that any limitations upon the general powers of the directors, intended to define the boundaries of their discretion, should be given due effect if the mortgage is to afford any substantial security to bondholders for the payment of their interest, and if these are found in the instrument, they should not be nullified by a latitudinarian interpretation calculated to relegate bondholders to the position of stockholders. They are not stockholders, but creditors, who contract upon the assurance that the income fund upon which they rely when they purchase the bonds, is to continue to exist during the life of the mortgage.<sup>56</sup> On application for an in-

<sup>53</sup> Spies v. Chicago, etc. R. Co. (1889), 40 Fed. Rep. 34, 6 Ry. & Corp. L. J. 463; Day v. Ogdensburg, etc. R. Co., 107 N. Y. 129, 146.

<sup>54</sup> Spies v. Chicago, etc. R. Co. (1889), 40 Fed. Rep. 34, 6 Ry. & Corp. L. J. 463; Day v. Ogdensburg, etc. R. Co., 107 N. Y. 129, 146.

<sup>55</sup> Barry v. Missouri, etc. R. Co., 27 Fed. Rep. 1; McIntosh v. Flint, etc. R. Co., 34 Fed. Rep. 582. The perfunctory ceremony of passing a resolution that no income has been earned, without an attempt

to ascertain the fact, is not compliance with the letter or the spirit of the contract. Spies v. Chicago, etc. R. Co. (1889), 40 Fed. Rep. 34, 6 Ry. & Corp. L. J. 463.

<sup>56</sup> Spies v. Chicago, etc. R. Co. (1889), 40 Fed. Rep. 34, 6 Ry. & Corp. L. J. 463. As to what sums may be deducted from the gross earnings of a railway company in determining the amount of net earnings, see Beach on Railways, § 632, citing Barry v. Missouri, etc. R. Co., 27 Fed. Rep. 1, 24 Fed. Rep. 829, 4 Ry. & Corp. L. J. 198.

junction against misappropriation of income, which has suddenly fallen from a large sum to nothing, the company must sustain its position by figures showing the condition of its business.<sup>57</sup>

**§ 1179. Recording mortgages.**—Corporate mortgages must be recorded in the same manner and for the same purpose as those upon the property of natural persons. Accordingly car-trust contracts, and other leases and conditional sales, where payments are to be made in instalments for personal property, must be recorded as chattel mortgages.<sup>58</sup> But corporate mortgages, covering both realty and personality, need not be recorded as chattel mortgages.<sup>59</sup> Nor in England need a debenture charging personal as well as real property be registered as a bill of sale.<sup>60</sup> A foreign corporation being a non-resident, the recording of its mortgage covering personality as well as realty, does not give the mortgagee a lien as against creditors who sue before the foreclosure proceedings, where, under a statute, a mortgage of personality, to be valid as against third parties, must be recorded in the county in which the mortgagor resides.<sup>61</sup> An informally executed corporate mortgage can not be recorded.<sup>62</sup> Under a statute refusing to a corporate mortgage any priority over existing unsecured creditors, where a corporate debt secured by a mortgage was assumed by another corporation and a new mortgage given, the first mortgage being cancelled of record, and subsequently the original debtor resumed the debt, giving a new mortgage, the second mortgage being cancelled,—it was held that, as against intermediate creditors, no

<sup>57</sup> *Barry v. Missouri, etc. Ry. Co.*, 36 Fed. Rep. 228.

<sup>58</sup> *Heryford v. Davis* (1880), 102 U. S. 235; *Hervey v. Rhode Island, etc. Works*, 93 U. S. 664; *Frank v. Denver, etc. R. Co.* (1885), 23 Fed. Rep. 123; *Fosdick v. Schall* (1878), 99 U. S. 235, 250; *Green v. Van Buskirk*, 5 Wall. 307; *Murch v. Wright*, 46 Ill. 488, 95 Am. Dec. 455.

<sup>59</sup> *Metropolitan Trust Co. v. Pennsylvania R. Co.* (1886), 25 Fed. Rep. 760; *Farmers' Loan & Trust Co. v. St. Joseph, etc. R. Co.*, 3 Dill. 412. *Cf. Hammock v. Farmers', etc. Co.*, 105 U. S. 77; *Williamson v. New Jersey, etc. R. Co.*, 29 N. J. Eq. 311.

<sup>60</sup> *Reid v. Joannon*, 25 Q. B. Div.

300. *Cf. Edwards v. Edwards*, 2 Ch. Div. 297; *Davis v. Goodman*, 5 C. P. Div. 128; *Edmonds v. Blaina, etc. Co.*, 36 Ch. Div. 215; *Levy v. Abercarris, etc. Co.*, 37 Ch. Div. 260; *Sopham v. Grenside*, 37 Ch. Div. 281; *Swift v. Pannell*, 24 Ch. Div. 210; *Casson v. Churchman*, 53 L. J. Q. B. 335; *Connelly v. Steer*, 7 Q. B. Div. 520; *Ross v. Army, etc. Co.*, 34 Ch. Div. 43; *Jenkinson v. Brandley Min. Co.*, 19 Q. B. Div. 568; *Brocklehurst v. Railway, etc. Co.*, Week. Notes (1884), p. 70.

<sup>61</sup> *Watson v. Thompson Lumber Co.* (1887), 49 Ark. 83, construing Ark. Dig. Laws, § 4742.

<sup>62</sup> *Duke v. Markham* (1890), 105 N. C. 131.

lien or priority could be claimed under the cancelled mortgages.<sup>63</sup> An unrecorded mortgage is nevertheless valid as between the parties thereto, and has priority over the claims of other persons extending credit to the corporation with actual knowledge thereof.<sup>64</sup> It has been decided in England, however, that under a law which requires all mortgages and charges specifically affecting property of a company to be registered in the company's register of mortgages, the omission to so register, even in the case of a mortgage to a director, will not invalidate the charge.<sup>65</sup> Where rolling-stock of a railroad is held to be personal property and is mortgaged, it must be recorded as a chattel mortgage in all the counties, and other registration jurisdictions through which the railroad runs, in order to be free from execution sale.<sup>66</sup> The mortgage attaches as a lien from the date of registration, whether or not the bonds are issued before other liens have attached.<sup>67</sup> An unrecorded mortgage is not good as against the receiver of the corporate property.<sup>68</sup> A mortgage was held to be not fraudulent, though by agreement withheld from registration with the object of protecting the credit of the corporation.<sup>69</sup> The mortgage trustee, certifying on the bond that it is secured by the mortgage, who delays registration of the mortgage until another is recorded, is liable for loss by a bondholder suffered by delay.<sup>70</sup> Where, at the instance of the corporation, the mortgagee withholds its mortgage from the record, in order to deceive the public until the mortgaging corporation becomes insolvent, the mortgage may be set aside for fraud.<sup>71</sup>

**§ 1180. Priorities among mortgagees.**—As a mortgagee can obtain no higher right than the mortgagor possesses,<sup>72</sup> the mort-

<sup>63</sup> *Traders' Nat. Bank v. Lawrence Manuf. Co.* (1887), 96 N. C. 298.

<sup>64</sup> *Coe v. Columbus, etc. R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518. But where creditors of the railway company, having no actual notice of an unrecorded mortgage, have the right to levy upon the corporate property, they will not be postponed to the mortgage creditors by reason of the latter having instituted foreclosure proceedings. *Coe v. New Jersey Midland R. Co.*, 31 N. J. Eq. 105.

<sup>65</sup> *Wright v. Horton* (1887), 12 App. Cas. 371.

<sup>66</sup> *Radebaugh v. Tacoma, etc. R. R.* (1894), 8 Wash. 570, 36 Pac. 460; *Union, etc. Co. v. Southern, etc. Co.* (1892), 51 Fed. 840.

<sup>67</sup> *Central Trust Co. v. Bartlett* (1894), 57 N. J. L. 206.

<sup>68</sup> *Cheney v. Maumee, etc. Co.* (1901), 64 Ohio St. 205.

<sup>69</sup> *American, etc. Bank v. McGettigan* (1899), 152 Ind. 582.

<sup>70</sup> *Miles v. Vivian* (1897), 79 Fed. 848.

<sup>71</sup> *Curtis v. Lewis* (Conn. 1902), 50 Atl. 878.

<sup>72</sup> *Robson v. Michigan, etc. R. Co.*, 37 Mich. 70; *Washington, etc. R. Co. v. Lewis*, 83 Va. 246; Chi-

gagees of a company which sells its property to another,<sup>73</sup> or of a company which is consolidated with another, have a lien upon the property superior to that of the mortgagees of the purchaser or company with which the consolidation is effected.<sup>74</sup> The latter take the property *cum onere*.<sup>75</sup> The lien of the bonds of one company will not be enlarged or perfected by the consolidation of that company with others.<sup>76</sup> But a mortgage on the property of an old railroad corporation, given by the successor to its property and franchises, is entitled to priority over the claim of a creditor for services and advances to the former, who did not obtain a judgment against either corporation until some years after the mortgage was given, and the nature of whose services and advances does not entitle him to a statutory lien on the corporate property.<sup>77</sup> The preferred stockholder with cumulative dividend, secured by mortgage, can not enforce the mortgage against the fund arising from property sold on dissolution, where the dissolution and sale occurred before the time provided in the mortgage for payment out of such fund, upon the happening of such dissolution and sale.<sup>78</sup> The right to priority payment of a mechanic's lien filed within the statutory period, but after insolvency and appointment of a receiver, is not affected by a sale of the corporate property, as free from incumbrance, when the existence of the lien did not affect the price brought at the sale.<sup>79</sup>

cago, etc. R. Co. v. Lœwenthal (1879), 93 Ill. 433; Haven v. Emery, 33 N. H. 66; Williamson v. New Jersey, etc. R. Co., 28 N. J. Eq. 277. *Cf.* Barnes v. Chicago, etc. R. Co., 122 U. S. 1; Wabash, etc. R. Co. v. Ham, 114 U. S. 595; Chicago, etc. R. Co. v. Howard, 7 Wall. 392; Pittsburgh, etc. R. Co. v. Indianapolis, etc. R. Co., 8 Biss. 456.

<sup>73</sup> Branch v. Atlantic, etc. R. Co., 3 Woods, 481.

<sup>74</sup> Rutten v. Union Pacific R. Co., 17 Fed. Rep. 480; Gale v. Troy, etc. R. Co. (1888), 2 N. Y. Supp. 354; Polhemus v. Fitchburg R. Co. (1888), 50 Hun, 397, 5 Ry. & Corp. L. J. 212; Hamlin v. Gerrard, 72 Me. 62. *Cf.* Gilbert v. Washington, etc. R. Co., 33 Grat. 556.

<sup>75</sup> Chicago, K. & W. R. Co. v. Putnam (1887), 36 Kan. 121; Fosdick v. Schall (1878), 99 U. S. 235, 251, citing United States v. New Orleans R. Co., 12 Wall. 362. *Acc.* Fosdick v. Car Co., 99 U. S. 256; Hall v. Frost, 99 U. S. 389; Huidekoper v. Locomotive Works, 99 U. S. 258; Rogers Locomotive Works v. Lewis, 4 Dill. 158. See Coe v. New Jersey Midland R. Co., 31 N. J. Eq. 105.

<sup>76</sup> Wabash, etc. Ry. Co. v. Ham, 114 U. S. 587.

<sup>77</sup> Fogg v. Blair (1890), 133 U. S. 534.

<sup>78</sup> Black v. Hobart T. Co. (N. J. Eq. 1903), 56 Atl. 1131.

<sup>79</sup> Doty v. Auditorium, etc. Co. (N. J. Eq. 1904), 56 Atl. 720.

**§ 1181. (a) Superior liens. Execution. Mechanics' lien. Taxes. Contractors, etc.**—Levy of execution upon a railroad or part of it. Public policy has established the rule against executions upon railroad property. A judgment creditor may file bill in equity for sequestration and sale of the railroad.<sup>80</sup>

*Mechanic's lien* laws, unless in express terms, do not apply to railroads.<sup>81</sup> Statutory liens are subject to prior mortgages on the corporate property, unless expressly provided otherwise.<sup>82</sup>

*Taxes* are prior in right to all claims except judicial costs.<sup>83</sup> But the tax collector must apply to the court instead of levying on the property of the corporation.<sup>84</sup> Where a receiver is in charge of railroad property the court may enjoin the collection of taxes.<sup>85</sup>

*A contractor's lien* for construction work upon a railroad in the absence of statute does not exist merely because he has possession of the work.<sup>86</sup> And even if he have a statutory lien, its foreclosure will not affect a subsequent mortgagee, who is not made a party defendant.<sup>87</sup>

*A purchase-money mortgage*, is prior in right to a previous mortgage given by the purchaser, whether or not it included after-acquired property.<sup>88</sup>

*Mortgage by the corporation to its directors*.—An insolvent corporation may mortgage its property to its directors to secure the repayment of funds advanced by the directors to pay the debts of the corporation, but not to secure any antecedent debt.<sup>89</sup> "There are cases which uphold mortgages given by insolvent corporations to their directors, but those cases are wrong in principle and law."<sup>90</sup>

**§ 1182. (b) "Six months rule," as to labor and supply claims.** "As I understand the current of cases which began with Fosdick

<sup>80</sup> *Seventh National Bank v. Shenandoah Iron Co.* (1887), 35 Fed. 436.

<sup>81</sup> *Greenwood, etc. R. R. v. Strand* (1896), 77 Fed. 498.

<sup>82</sup> *Toledo, etc. R. R. v. Hamilton* (1890), 134 U. S. 296.

<sup>83</sup> *First National Bank v. Ewing* (1900), 103 Fed. 168.

<sup>84</sup> *Ledeau v. LaBee* (1897), 83 Fed. 761.

<sup>85</sup> *In re Tyler* (1893), 149 U. S. 164.

<sup>86</sup> *Wright v. Kentucky, etc. R. R.*, 117 U. S. 172.

<sup>87</sup> *Fidelity, etc. Co. v. Schenley, etc. Ry.* (1899), 189 Pa. St. 363.

<sup>88</sup> *United States v. New Orleans* (1870), 12 Wall 362.

<sup>89</sup> *Stout v. Yaeger Milling Co.* (1882), 13 Fed. 802; *White, etc. Co. v. Pettes* (1887), 30 Fed. 864;

<sup>90</sup> *Lippincott v. Shaw, etc. Co.* (1885), 25 Fed. 577; *Corbett v. Woodward* (1879), 5 Sawyer, 403.

<sup>91</sup> *Cook on Corporations*, pp. 1653, 1654.

v. Schall (1878), 99 U. S. 235, the rule is this: When holders of railroad bonds secured by mortgage, come into a court of equity and ask, not only the foreclosure of the mortgage, but also the appointment of a receiver, into whose hands the corporation shall be compelled to deliver all its property, the court, as a condition precedent to granting this last request can impose terms in reference to the payment from the income during the receivership of such outstanding claims as address themselves peculiarly to the protection of the court. . . . This is not a right vested in the employes, or an equity administered in their favor. It is a personal protection given to them by the court *ex gratia*, moved thereto by the fact that this class depend upon their daily labor for their daily food. Afterwards, when the court has assumed the administration of the property, and it appearing that there are certain outstanding claims in the hands of persons who furnished equipment, materials, supplies, or anything which was necessary to keep the railroad a "going concern," then the court administers an equity, and the benefits of this equity inure as well to the original parties keeping up the road as to their assignees."<sup>91</sup> The provisions of a statute,—that mortgages executed by corporations upon their property or earnings shall not exempt the property or earnings from execution for the satisfaction of a judgment obtained for labor or materials,—do not contemplate a lien for materials furnished from abroad, where its personal credit alone was relied on and a negotiable security taken.<sup>92</sup> A statutory proviso that all debts and contracts of any corporation, prior to the execution of any mortgage by it, shall have a first lien upon its property and franchises and shall be paid off or secured before the mortgage shall be registered, is not to be limited to corporations formed by purchasers under a deed of trust or mortgage made by an insolvent or expiring corporation, but extends to corporations generally, however brought into existence. Hence where a corporation executes a mortgage to secure bonds issued for the purpose of raising money, its debts, existing at the time of the execution of the mortgage, have priority over the bonds.<sup>93</sup> The purpose of a receiver-

<sup>91</sup> Finance, etc. Co. v. Charles-ton, etc. R. R. (1892), 49 Fed. 693; Quincy, etc. R. R. v. Humphreys (1892), 145 U. S. 82; Wood v. New York, etc. R. R. (1895), 70 Fed. Rep. 741.

<sup>92</sup> Traders' Nat. Bank v. Law-

rence Manuf. Co. (1887), 96 N. C. 298, construing N. C. Code, § 1255.

<sup>93</sup> Traders' Nat. Bank v. Lawrence Manuf. Co., 96 N. C. 298, construing Battle's Revisal, ch. 26, § 48.

ship being to preserve the property contested for, *pendente lite*, it has no effect, of itself, upon the title to the property, either to change it or to create a lien upon it.<sup>94</sup> But a mortgagee acquires a specific lien upon the rents by obtaining the appointment of a receiver of them, and if he be a second or third incumbrancer, the court will give him the benefit of his superior diligence over his senior in respect to the rents which accrued during the time that the elder mortgagee took no measures to have the receivership extended to his suit and for his benefit.<sup>95</sup> It is sometimes necessary to appoint a receiver of property where the interests of the parties to the suit are so connected with those of third persons that the necessary possession of the officer of the court conflicts with the legal rights of the latter. But the court will refuse to divest a previous possession of third persons unnecessarily.<sup>96</sup>

**§ 1183. (c) Debts for operating expenses. Receivers' certificates.**—Debts incurred in operating concerns in whose continued operation the public has an interest, are a charge upon their property superior to all mortgage liens.<sup>97</sup> Accordingly claims for current expenses in operating a railroad for a reasonable time,

<sup>94</sup> Harman v. McMullin, 4 Ry. & Corp. L. J. 515; Ellis v. Boston, Hartford & E. Ry. Co., 107 Mass. 1; *Ex parte* Dunn, 8 S. C. 207; *In re* Colvin, 3 Md. Ch. Dec. 278; Beverley v. Brooke, 4 Gratt. 211; Skip v. Harwood, 3 Atkins, 564; Huguenin v. Baseley, 13 Ves. 105; Cooke v. Gwyn, 3 Atk. 689; Ellicott v. Warford, 4 Md. 80; Blakeney v. Dufaur, 15 Beav. 40; Leavitt v. Yates, 4 Edw. Ch. 162; Brown v. Northrup, 15 Abb. Pr. (N. S.) 333; *Ex parte* Walker, 25 Ala. 104; Bitting v. Ten Eyck, 85 Ind. 357; Ellicott v. United States Ins. Co., 7 Gill, 307; Pittsburgh, etc. R. Co. v. Indianapolis, etc. R. Co., 8 Biss. 456; Beach on Receivers, § 1.

<sup>95</sup> Beach on Railways, § 715, citing Port v. Dorr, 4 Edw. Ch. 412; Howell v. Ripley, 10 Paige, 43; Washington Life Ins. Co. v. Fleischauer, 10 Hun, 117; Ranney v. Peyser, 83 N. Y. 1; Sanders v. Lisle, Ir. R. 4 Eq. 43; Agra & Masterman's Bank v. Barry, Ir. R. 3 Eq. 443; Lanauze v. Belfast, Holywood & Bangor Ry. Co., Ir.

R. 3 Eq. 454; Miltenberger v. Logansport R. Co., 106 U. S. 286.

<sup>96</sup> Chancellor Walworth in Vincent v. Parker, 7 Paige, 65; Howell v. Ripley, 10 Paige, 43; Brooks v. Greathead, 1 Jac. & W. 176; Brien v. Paul, 3 Tenn. Ch. 357; Skinner v. Maxwell, 68 N. C. 400; Angel v. Smith, 9 Ves. 335. Cf. Riggs v. Whitney 15 Abb. Pr. 388; Beach on Receivers, § 6.

<sup>97</sup> Calhoun v. St. Louis, etc. R. Co., 14 Fed. Rep. 9; Galveston, etc. R. Co. v. Cowdrey, 11 Wall. 459, 483. And every railroad mortgagee, in accepting his security, is deemed by legal implication to agree that the current debts made in the ordinary course of business shall be paid from the current receipts before he shall have any claim upon the income. Fosdick v. Schall (1878), 99 U. S. 235, 252; Burnham v. Bowen (1884), 111 U. S. 776, 783; Huidekoper v. Locomotive Works (1878), 99 U. S. 258, 260; Hale v. Frost, 99 U. S. 389; American Bridge Co. v. Heidelbach, 94 U. S.

usually six months before the receivership, are payable by the receiver.<sup>98</sup> The debts incurred by the receiver in operating the road are of course payable before the mortgage debt.<sup>99</sup> But these expenses must be paid out of the income of the property while in the

798; Gilman v. Illinois, etc. Telegraph Co., 91 U. S. 603; Schutte v. Florida R. Co., 3 Woods, 692, 712; Turner v. Indianapolis, etc. R. Co., 8 Biss. 315; Williamson v. Washington City, etc. R. Co., 33 Grat. 624; Union Trust Co. v. Illinois, etc. R. Co., 117 U. S. 434; St. Louis, etc. R. Co. v. Cleveland, etc. Ry. Co. (1888), 125 U. S. 658; Central Trust Co. v. Texas, etc. Ry. Co., 27 Fed. Rep. 178; Union Trust Co. v. Soutter, 107 U. S. 591; Farmers' Loan & Trust Co. v. Vicksburg, etc. R. Co., 33 Fed. Rep. 778; Blair v. St. Louis, etc. R. Co., 22 Fed. Rep. 471, 23 Fed. Rep. 521, 33 Fed. Rep. 778; Langdon v. Vermont, etc. R. Co., 54 Vt. 593.

<sup>98</sup> Turner v. Indianapolis, etc. R. Co., 8 Biss. 315; Beach on Receivers, § 369; Duncan v. Mobile, etc. R. Co., 2 Woods, 542; Brown v. New York, etc. Ry. Co., 19 How. Pr. 84; Huidekoper v. Locomotive Works, 99 U. S. 258; Douglas v. Cline, 12 Bush, 608; Skiddy v. Atlantic, etc. R. Co., 3 Hughes, 320; Union Trust Co. v. Walker, 107 U. S. 596; Williamson v. Washington City, etc. R. Co., 33 Grat. 624; Central Trust Co. v. Texas, etc. Ry., 22 Fed. Rep. 135; Atkins v. Petersburg R. Co., 3 Hughes, 307. Money due upon contracts entered into by a railroad corporation before the appointment of receivers, and which does not constitute a lien upon the property of the company, is part of the general indebtedness of the road, and although binding upon it, is not to be paid by the receiver. Such a payment would clearly be giving a preference to creditors of equal right and would defeat the object of foreclosure.

Ellis v. Boston, H. & E. R. Co., 107 Mass. 1, *sub nom.* Graham v. Boston, H. & E. R. Co., 118 U. S. 161, holding, however, that the contracts may be carried out by the receivers if necessary or if clearly beneficial to the trust. An order of appointment authorizing a receiver to pay amounts due and maturing, for materials and supplies for the operation of the road, is construed to refer to the payment of such obligations as are necessary to preserve the line in good running condition; and the court will refuse to direct its receiver to pay obligations which had been incurred long before his appointment, considering the rights of the mortgagees of primary importance as contrasted with them. Brown v. New York, etc. R. Co., 19 How. Pr. 84; Beach on Receivers, § 363.

<sup>99</sup> Wallace v. Loomis, 97 U. S. 146; Miltenberger v. Logansport R. Co., 106 U. S. 286; Taylor v. Philadelphia, etc. R. Co., 7 Fed. Rep. 377; Atkins v. Petersburg R. Co., 3 Hughes, 307; Beach on Receivers, § 367; Denniston v. Chicago, etc. R. Co., 4 Biss. 414; Union Trust Co. v. Illinois Midland R. Co. (1886), 117 U. S. 434; Duncan v. Trustees of Chesapeake etc. R. Co., 9 Am. Ry. Rep. 386; Metropolitan Trust Co. v. Tonawanda, etc. R. Co., 103 N. Y. 245; Union Trust Co. v. Soutter, 107 U. S. 591; Douglas v. Cline, 12 Bush, 608; Fosdick v. Schall, 99 U. S. 235; Burnham v. Bower (1884), 111 U. S. 776; Union Trust Co. v. Walker, 107 U. S. 596; Skiddy v. Atlantic, etc. Ry. Co., 3 Hughes, 320; Central Trust Co. v. Wabash, etc. R. Co., 25 Fed. Rep. 69.

receiver's hands,<sup>1</sup> and can only be made a charge upon the body of the property by express order of the court.<sup>2</sup> Again, statutory liens for labor and materials outrank the mortgage lien.<sup>3</sup> If current earnings are used for the benefit of mortgage creditors before the current expenses are paid, the mortgage security is chargable with its restoration.<sup>4</sup> Current debts, incurred in operating expense of the railroad, are payable out of the current receipts in priority to the mortgage debts.<sup>5</sup> Debts due the State may be a superior lien,<sup>6</sup> and vendors' liens have the priority they would have in the case of natural persons.<sup>7</sup> Judgment creditors are entitled to be paid out of the funds according to the nature of their claims, not by virtue of reducing them to judgment.<sup>8</sup> Persons making advancements to pay preferred claims do not thereby obtain the

<sup>1</sup> Schutte v. Florida R. Co., 3 Woods, 692, 712; Beach on Receivers, § 376; Hale v. Frost (1878), 99 U. S. 389; Miltenberger v. Logansport R. Co., 106 U. S. 286.

<sup>2</sup> Hand v. Savannah, etc. R. Co., (1879), 17 S. C. 219; Blair v. St. Louis, etc. R. Co., 22 Fed. Rep. 471; Beach on Receivers, § 377; Vermont, etc. R. Co. v. Vermont Central R. Co., 50 Vt. 500; Wallace v. Loomis, 97 U. S. 146; Miltenberger v. Logansport R. Co., 106 U. S. 286; Kennedy v. St. Paul, etc. R. Co., 2 Dill. 448, 5 Dill. 519; Duncan v. Trustees of Chesapeake, etc. R. Co., 9 Am. Ry. Rep. 386; Union Trust Co. v. Illinois Midland R. Co. (1885), 117 U. S. 434; Metropolitan Trust Co. v. Tonawanda Valley, etc. R. Co. (1886), 103 N. Y. 245; Blair v. St. Louis, etc. R. Co., 22 Fed. Rep. 471; Hale v. Nashua, etc. R. Co., 60 N. H. 333; McLane v. Placerville, etc. R. Co., 66 Cal. 606.

<sup>3</sup> Poland v. Lamoille Valley R. Co., 52 Vt. 144; Blair v. St. Louis, etc. R. Co., 25 Fed. Rep. 232, 19 Fed. Rep. 861; Traders' National Bank v. Lawrence Manuf. Co., 96 N. C. 298; Receivers, etc. v. Mortendyke, 27 N. J. Eq. 658. Salaries of officers of a railroad company are not classed as wages to employees and have been refused preference. Addison v. Lewis, 75

Va. 701. The matter of priority of counsel fees for services rendered before the receivership was considered in Bayliss v. Lafayette, etc. R. Co., 9 Biss. 90.

<sup>4</sup> St. Louis, etc. R. Co. v. Cleveland Ry. Co., 125 U. S. 658, 673; Union Trust Co. v. Morrison, 125 U. S. 591, 612; Sage v. Memphis, etc. R. Co., 125 U. S. 361; Union Trust Co. v. Illinois Midland Ry. Co., 117 U. S. 434; Burnham v. Bowen (1884), 111 U. S. 776, 783; Union Trust Co. v. Soutter, 107 U. S. 591; Miltenberger v. Logansport Ry. Co., 106 U. S. 286; Fosdick v. Schall (1878), 99 U. S. 235; Menasha v. Milwaukee, etc. R. Co., 52 Wis. 414; Duncan v. Mobile, etc. R. Co., 2 Woods, 542; Hale v. Burlington, etc. R. Co., 1 McCrary, 58.

<sup>5</sup> Southern Ry. v. Carnegie, etc. Co. (1900), 176 U. S. 257.

<sup>6</sup> Ralston v. Crittenden, 3 McCrary, 332. But see Brown v. State, 62 Md. 439.

<sup>7</sup> Florida v. Anderson (1875), 91 U. S. 667; Anderson v. Pensacola R. Co., 2 Woods, 628; Carpenter v. Black Hawk, etc. Co., 65 N. Y. 43; Fisk v. Potter, 2 Abb. App. Dec. 138; Texas, etc. Ry. Co. v. Gentry (1888), 69 Tex. 625; Pierce v. Milwaukee, etc. R. Co., 24 Wis. 551, 1 Am. Rep. 203.

<sup>8</sup> Gibert v. Washington City, etc. R. Co., 2 Woods, 519; Turner v.

right of subrogation to the lien the debts enjoyed in the hands of the original debtor.<sup>9</sup>

*Receivers' certificates.*—If there are no current funds on hand, the receiver may be authorized by the court to procure credit and issue vouchers or acknowledgments of indebtedness known as "receivers' certificates," for the purpose of preserving the property from destruction or serious injury.<sup>10</sup> The theory of the matter is that the expenditure is necessary to preserve the property; the mortgagee assents to the expenditure; the court orders it to be

Indianapolis, etc. R. Co., 8 Biss. 527; Legg v. Matthieson, 2 Giff. 71; Gardner v. London, etc. Ry. Co., L. R. 2 Ch. App. 201. Except, of course, where they have done so before the mortgage was executed. Bergen v. Porpoise, etc. Co., 41 N. J. Eq. 238.

<sup>9</sup> Penn v. Calhoun (1887), 121 U. S. 521; Fosdick v. Schall, 99 U. S. 255; Memphis, etc. R. Co. v. Don, 124 U. S. 652; Blair v. St. Louis, etc. Ry. Co., 23 Fed. Rep. 521; Farmers', etc. Co. v. Vicksburg, etc. R. Co., 33 Fed. Rep. 778; Kelly v. Green Bay, etc. R. Co., 10 Biss. 151; Receivers of New Jersey Midland R. Co. v. Wortendyke, 27 N. J. Eq. 658; Cairo, etc. R. Co. v. Fackney, 78 Ill. 116. But see Farmers' Loan & Trust Co. v. Vicksburg, etc. R. Co., 33 Fed. Rep. 778.

<sup>10</sup> Swan v. Clark, 110 U. S. 602; Barton v. Barbour, 104 U. S. 126; Shaw v. Railroad Co., 100 U. S. 605, 612; Wallace v. Loomis, 97 U. S. 146, 162; Jerome v. McCarter, 94 U. S. 734; Cowdrey v. Galveston, etc. R. Co., 1 Woods, 331; Investment Co. v. Ohio, etc. R. Co., 36 Fed. 48; Union Trust Co. v. Chicago, etc. R. Co., 7 Fed. Rep. 513; Meyer v. Johnson, 53 Ala. 237, 348; Turner v. Peoria, etc. R. Co., 95 Ill. 134; Bank of Montreal v. Chicago, etc. R. Co., 48 Iowa, 518; Jones on Railroad Securities, § 533; High on Receivers, (2d ed.) § 398, d; "The Doctrine of Receivers' Certificates," by R. F. Stevens, Jr., 23 Cent. L. J. 340. As to the necessity which justifies the

court in authorizing receivers' certificates to be issued, see: Meyer v. Johnson, 53 Ala. 237; Wallace v. Loomis, 97 U. S. 146, 162; Hoover v. Montclair, etc. R. Co., 29 N. J. Eq. 4; Metropolitan Trust Co. v. Tonawanda Valley, etc. R. Co., 103 N. Y. 245; Vermont, etc. R. Co. v. Vermont Central R. Co., 50 Vt. 500, 569; Swann v. Clark, 110 U. S. 602; Vilas v. Page, 106 N. Y. 439, 451, 452; *In re Philadelphia*, etc. R. Co., 14 Phila. 501; Humphrey v. Allen, 101 Ill. 490; Taylor v. Philadelphia, etc. R. Co., 7 Fed. Rep. 377; Union Trusts Co. v. Illinois Midland R. Co., 117 U. S. 434; Stanton v. Alabama, etc. R. Co., 2 Woods, 506; Credit Co. (Limited) v. Arkansas Central R. Co., 15 Fed. Rep. 46; Barton v. Barbour, 104 U. S. 126; Coe v. New Jersey Midland R. Co., 27 N. J. Eq. 37; Turner v. Peoria, etc. R. Co., 95 Ill. 134, 35 Am. Rep. 144; these cases holding that the court may authorize their issue to meet operating expenses, to buy machinery, rolling-stock and supplies, to maintain the roadway in safe repair and to pay the rent of rolling-stock. It has even been held that under some circumstances an unfinished line of railway may be completed and paid for by means of receivers' certificates. Kennedy v. St. Paul, etc. R. Co., 2 Dill. 448, 5 Dill. 519; Bank of Montreal v. Chicago, etc. R. Co., 48 Iowa, 518. Acc. Gibert v. Washington, etc. R. Co., 33 Gratt. 586, 645. Acc. Jerome v. McCarter, 94 U. S. 734, 738 (a

made; it is, therefore, properly a lien prior to the mortgage, and must be paid first. These facts, or some others equivalent thereto, and the order of the court declaring the lien, are usually recited in the body of the certificate itself. The power of a court of equity to authorize the issue of certificates by the receiver, and to make them a first lien upon the property, payable before the first mortgage bonds, is not questioned in any of the cases in our State or federal reports. It has been expressly upheld in many leading cases.<sup>11</sup>

(canal case). But see *Shaw v. Railroad Co.*, 100 U. S. 605; *Hand v. Railway Co.*, 10 S. C. 406, *sub nom.* *Hand v. Savannah*, etc. R. Co., 17 S. C. 219; *Credit Co. v. Arkansas Central R. Co.*, 15 Fed. Rep. 46; *Vermont*, etc. R. Co. v. *Vermont Central R. Co.*, 50 Vt. 500, 569, 46 Vt. 792; *Secor v. Toledo, Peoria & Warsaw R. Co.*, 7 Biss. 513. There is to be found some authority for the rule that a receiver may be allowed to issue certificates in payment for labor, materials, supplies and taxes upon the property due prior to his appointment. *Humphreys v. Allen*, 101 Ill. 490; *Taylor v. Philadelphia*, etc. R. Co., 7 Fed. Rep. 377. But in New York it is held that, a court has no power to authorize a receiver to pay, or to issue his certificates of indebtedness in payment for labor and services in operating the road prior to his receivership, and to make the certificates so issued a lien prior to the mortgage. *Metropolitan Trust Co. v. Tonawanda Valley*, etc. R. Co., 103 N. Y. 245, 1 Ry. & Corp. L. J. 65; reversing 40 Hun, 80; *Raht v. Attrill*, 42 Hun, 414, 418, 106 N. Y. 423, 60 Am. Rep. 456; citing *Burnham v. Bowen*, 111 U. S. 776, 782; *Beach on Receivers*, § 388.

<sup>11</sup> *Beach on Receivers*, § 392, citing *Stanton v. Alabama*, etc. R. Co., 2 Woods, 506; *Hoover v. Montclair & Greenwood Lake R. Co.*, 29 N. J. Eq. 4; *Meyer v. Johnson*, 53 Ala. 237, 350; *Kennedy v. St. Paul & Pacific R. Co.*, 2 Dill.

448, 5 Dill. 519; *Bank of Montreal v. Chicago, C. & W. R. Co.*, 48 Iowa, 518; *Taylor v. Philadelphia & Reading R. Co.*, 7 Fed. Rep. 377; *Jerome v. McCarter*, 94 U. S. 734; *Cowdrey v. Railroad Co.*, 1 Woods, 331; *Vermont & Canada R. Co. v. Vermont Central R. Co.*, 49 Vt. 792, 50 Vt. 500, 569; *Credit Co. v. Arkansas Central R. Co.*, 15 Fed. Rep. 46, 23 Am. Law Reg. (N. S.) 35, and see the note thereto by Mr. Adelbert Hamilton; *Wallace v. Loomis*, 97 U. S. 146, 162; *Miltenberger v. Logansport R. Co.*, 106 U. S. 286, 309; *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434, 451, 454; *Dunham v. Cincinnati*, etc. R. Co., 1 Wall. 254; *Huidekoper v. Locomotive Works*, 99 U. S. 258; *Dennis-ton v. Chicago*, etc. R. Co., 4 Biss. 414; *Duncan v. Mobile & Ohio R. Co.*, 2 Woods, 542; *Brown v. Erie Ry. Co.*, 19 How. Pr. 84; *Vatable v. New York*, etc. R. Co., 96 N. Y. 49; *Turner v. Indianapolis*, etc. R. Co., 8 Biss. 315; *Atkins v. Pittsburgh R. Co.*, 3 Hughes, 307; *Davis v. Gray*, 16 Wall. 203; *Douglas v. Cline*, 12 Bush, 608; *Tomney v. Spartanburg*, etc. R. Co., 4 Hughes, 640; *Kelly v. Receiver of Green Bay*, etc. R. Co., 10 Biss. 151, 5 Fed. Rep. 846; *Calhoun v. St. Louis*, etc. R. Co., 9 Biss. 330; *Ellis v. Boston, Hartford & Erie R. Co.*, 107 Mass. 28; *Coe v. Cincinnati, P. & I. R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518; *Gurney v. Atlantic*, etc. R. Co., 58 N. Y. 358; *Union Trust Co. v. New York*, etc. R. Co., 25 Fed. Rep. 803.

## CHAPTER XLIX.

### FORECLOSURE OR MORTGAGE.

<p>§ 1184. Foreclosure at common law. 1185. Strict foreclosure. 1186. Remedy by entry. 1187. Remedy by foreclosure. 1188. Foreclosure in case of quasi-public corporations. 1189. Jurisdiction of the courts. Interstate corporations. 1190. Parties in suits to foreclose. 1191. Holders of different liens as parties. 1192. Intervention. Who may intervene as parties. 1193. Foreclosure by bondholders. Right of trustee to foreclose. Refusal to foreclose. 1193a. Respective rights of majority and minority bondholders. 1194. Foreclosure on default of payment of interest. 1195. Receivers in foreclosure proceedings. Removal.</p>	<p>§ 1196. Defense of mortgagor. Estoppel to set up irregularity. 1197. Decree of sale in foreclosure. 1198. Binding effect of the decree. 1199. Sale under the decree. Who may bid. Setting aside the sale. 1200. Rights and liabilities of purchaser at foreclosure sale. 1201. Purchase by the bondholders and stockholders for reorganization. 1202. Transfer of the property to a new corporation. 1203. What passes by the sale. Whether franchises and exemptions pass by the sale. 1204. Redemption. Distribution of proceeds upon foreclosure sale.</p>
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#### References:

Mortgage. Sections 1166-1183.  
Insolvency. Sections 1205-1217.  
Receivers. Sections 1218-1245.  
Respective rights of majority and minority bondholders. Section 1160.  
Sale under decree in foreclosure. Section 739.  
Mortgage trustees in foreclosure proceedings. Sections 1171, 1204, 1244.

**§ 1184. Foreclosure at common law.**—Although corporate mortgages are for the benefit of all the holders of the bonds secured thereby, they are almost necessarily made to trustees.<sup>1</sup> For

<sup>1</sup> *Butler v. Rahm* (1877), 46 Md. 541. Cf. *Shaw v. Norfolk, etc. R. Co.*, 5 Gray, 162.

a provision in a deed of mortgage that, upon default, any bondholder is entitled to enter and sell the mortgaged property, is invalid for indefiniteness of the persons upon whom the power is conferred, and the impossibility of its execution.<sup>2</sup> Accordingly a bondholder, to avail himself of his lien on the company's property, must induce the trustees to proceed to foreclose it in the mode pointed out by the statute.<sup>3</sup> And if they refuse to act when they ought to do so, the bondholder may either compel them by *mandamus* or file a bill in equity to obtain the relief to which he may be entitled.<sup>4</sup> The law does not require of them either action in such case, but allows the bondholder himself to file a bill for foreclosure of the mortgage and make the trustee a party defendant.<sup>5</sup> Foreclosure proceedings can not be stayed on the ground of fraud, merely because the mortgagor and mortgagee companies have a common president and directors, and the mortgage trustees were directors or stockholders in the company to which the security was given.<sup>6</sup> At common law the mortgagee himself, or his trustee, was entitled to immediate possession of the premises, although there had been no default.<sup>7</sup> Therefore the provision was generally made in the mortgage that the mortgagor should retain the possession until default of payment, and many of the States so provide now by statute.

**§ 1185. Strict foreclosure.**—Upon default the trustee entered and took and held possession without any right of redemption. This harsh remedy is now disfavored by the courts, and they will not decree it, except where rights can not be protected otherwise.<sup>8</sup> In such decree of strict foreclosure the amount due must be found and a specified time allowed for redemption.<sup>9</sup> A strict foreclosure is disfavored, because it cuts off all second mort-

<sup>2</sup> *Mason v. York, etc. R. Co.*, 52 Me. 82, 103 (1861).

<sup>3</sup> *Florida v. Anderson* (1875), 91 U. S. 667.

<sup>4</sup> *Florida v. Anderson* (1875), 91 U. S. 667, 679.

<sup>5</sup> *Citizens' Bank v. Los Angeles, etc. Co.* (1900), 131 Cal. 187, 82 Am. St. Rep. 241.

<sup>6</sup> *Leavenworth County v. Chicago, etc. R. Co.* (1890), 134 U. S. 688. In this case the company which had indorsed and sold the bonds had paid out large sums of money on account of its indorse-

ment and on account of the construction of the mortgagor's railway, and there was no actual fraud, so the trust relations existing between the two companies was not regarded as invalidating the proceedings, notwithstanding the general doctrine laid down in many cases.

<sup>7</sup> *First Nat. Bank Ins. Co. v. Salisbury* (1881), 130 Mass. 303.

<sup>8</sup> *Denton v. Ontario Co. Nat. Bank* (1896), 150 N. Y. 126.

<sup>9</sup> *Clark v. Reyburn* (1868), 8 Wall. 318.

gagees and other creditors, and makes the first mortgagees tenants in common of the property.<sup>10</sup>

**§ 1186. Remedy by entry.**—Under provisions for entry upon default of payment, the trustees may lawfully take possession of the property without suit, and may hold it until the debt be satisfied.<sup>11</sup> If, however, the entry of the trustees be resisted, an order from a court of equity is the proper method of gaining possession.<sup>12</sup> Accordingly, a bill in equity to gain possession is usually resorted to, notwithstanding the provision that the mortgagee may take possession.<sup>13</sup> The effect of the decree is to establish their right of possession at the time the suit was begun, and to make the company's possession after that date wrongful.<sup>14</sup> In these cases no foreclosure is asked, and possession is claimed and given by virtue of the express agreement in the mortgage.<sup>15</sup> Until the bill is filed, or possession otherwise obtained, the earnings and income of the property are not affected by any lien.<sup>16</sup> But when a mortgage provides that upon default, the trustees, or their survivor, shall be entitled to take possession of a mortgaged railway, a court of equity has power, in an action to enforce the specific execution of the mortgage, to appoint the surviving trustee a receiver of the mortgaged property, to put him in possession thereof until the amount due is paid, and, the road being without rolling-stock or other equipments, to authorize him to make provision for purchasing the necessary equipments, so as to secure an income and profits.<sup>17</sup> When the trustees have made demand for possession under the mortgage by filing suit therefor, the com-

<sup>10</sup> *Sage v. Central R. R. Co.*, 99 U. S. 334 (1878).

<sup>11</sup> *Dow v. Memphis, etc. R. Co.* (1888), 124 U. S. 652; *Lee v. Swingly* (1887), 6 Mont. 596.

<sup>12</sup> *Shepley v. Atlantic, etc. R. Co.* (1867), 55 Me. 395.

<sup>13</sup> *Shepley v. Atlantic, etc. R. Co.* (1867), 55 Me. 395; *McLane v. Placerville, etc. R. Co.* (1885), 66 Cal. 606, 615; *Sacramento, etc. R. Co. v. Superior Court of San Francisco*, 55 Cal. 453; *Leeds v. Gifford* (1886), 41 N. J. Eq. 464; *American Bridge Co. v. Heidelbach* (1876), 94 U. S. 798; *Shaw v. Norfolk County R. Co.*, 5 Gray, 162. *Cf. Andrews v. Scotton*, 2 Bland, 629, 665.

<sup>14</sup> *Dow v. Memphis, etc. R. Co.* (1888), 124 U. S. 652.

<sup>15</sup> *Shepley v. Atlantic, etc. R. Co.* (1867), 55 Me. 395; *McLane v. Placerville, etc. R. Co.* (1885), 66 Cal. 606, 615.

<sup>16</sup> *American Bridge Co. v. Heidelbach* (1876), 94 U. S. 798; *Galveston R. Co. v. Cowdrey*, 11 Wall. 459; *Gilman v. Illinois, etc. Co.*, 91 U. S. 603.

<sup>17</sup> *McLane v. Placerville, etc. R. Co.* (1885), 66 Cal. 606, 615; *Shepley v. Atlantic, etc. R. Co.*, 55 Me. 395 (1867); *Shaw v. Norfolk Co. R. Co.*, 5 Gray, 162; *American Bridge Co. v. Heidelbach* (1876), 94 U. S. 798; *Gilman v. Illinois, etc. Co.*, 91 U. S. 603.

pany must from that time account for earnings; and it is immaterial that a receiver was not appointed, the company itself being treated in all respects as a receiver of the property, holding for the benefit of whomsoever in the end it shall be found to concern.<sup>18</sup>

**§ 1187. Remedy by foreclosure.**—Unless the mortgage by necessary implication or in express terms excludes it, the common-law right to sue upon a bond is not excluded by the right of entry after default given in the mortgage.<sup>19</sup> Neither is a statutory remedy deemed exclusive of the ordinary remedy at common law.<sup>20</sup> Nor do provisions in the mortgage authorizing entry and action at law after the default in the payment of interest has continued six months, bar suits in equity for the foreclosure of the mortgage immediately upon default, unless clearly so intended.<sup>21</sup> But the procedure prescribed in the mortgage deed, in the event of an entry by the trustees, is not binding upon the court in foreclosure proceedings.<sup>22</sup> The right to foreclose does not necessarily carry with it the right to have a receiver appointed.<sup>23</sup> But the inadequacy of the property as security for the mortgage debt, together with insolvency, or such precarious condition of corporate finances as renders it likely that the complainant will not be in as good a position, at the final decree, as at the time of his application for the appointment of a receiver, is considered good ground for granting the application.<sup>24</sup>

<sup>18</sup> *Dow v. Memphis R. Co.*, 24 U. S. 652, 655 (1888); *Galveston R. Co. v. Cowdrey*, 11 Wall. 459. But see *Mercantile Trust Co. v. Missouri, etc. R. Co.* (1888), 36 Fed. Rep. 221, 4 Ry. & Corp. L. J. 362.

<sup>19</sup> *Manning v. Norfolk, etc. R. Co.*, 29 Fed. Rep. 838.

<sup>20</sup> *Russell v. East Anglian Ry. Co.*, 3 Macn. & G. 125, construing 8 Vic., ch. 16, §§ 42 and 44; *Howell v. Western R. Co.* (1876), 94 U. S. 463. And a mortgagee or bondholder may take measures in chancery to protect his security before the money is payable. *Legg v. Mathieson*, 2 Giff. 71; *Wildy v. Mid-Hants Ry. Co.*, 16 Week. Rep. 409; *Browne & Theobald's Ry. Law*, 87.

<sup>21</sup> *Mercantile Trust Co. v. Missouri, etc. R. Co.*, 36 Fed. Rep. 221, 4 Ry. & Corp. L. J. 362, following *Chicago, etc. R. Co. v. Fosdick*, 106 U. S. 47. *Acc. Central Trust Co. v. New York City, etc. R. Co.*, 33 Hun, 513; *Tyson v. Weber*, 81 Ala. 470. Cf. *Hart v. Eastern Union Ry. Co.*, 7 Ex. 246, 8 Ex. 116; *Price v. Great Western Ry. Co.*, 16 Mees. & W. 244.

<sup>22</sup> *Farmers' Loan & Trust Co. v. Green Bay, etc. R. Co.*, 10 Biss. 203.

<sup>23</sup> Beach on Railways, § 704, and cases there cited.

<sup>24</sup> *Mercantile Trust Co. v. Missouri, etc. Ry. Co.*, 36 Fed. Rep. 221.

§ 1188. Foreclosure in case of quasi-public corporations.—  
Quasi-public corporations are those private corporations which are organized for a purpose which renders them necessary or particularly beneficial to the public, for which reason they are given special privileges not given to other corporations; as, the right of eminent domain granted to railroads, water, gas, electric light, telegraph companies and others. Though they owe special duties to the public, and are under special control of the legislature, they are not agencies or instruments of the government, but are for private gain, and are private corporations. The duties to the public of such *quasi*-public corporations, cause considerable variation in their treatment under foreclosure from that appropriate in the case of private parties and purely private corporations. The large sovereign powers given by the State to railway corporations are granted and exercised only upon the theory that these public rights are to be used to promote the general welfare of the people of the commonwealth; and the people have an interest in the maintenance of the undertaking as a "going concern," which is not to be defeated by its creditors.<sup>25</sup> Accordingly the courts are very reluctant to appoint receivers to take charge of these *quasi*-public properties, and decline to act unless clearly necessary to prevent a failure of justice.<sup>26</sup> It is in the application of this doctrine that the courts in England and in the United States differ.

<sup>25</sup> Beach on Railways, § 656, citing Gates v. Boston, etc. R. Co., 53 Conn. 333, 343 (1885); Burnham v. Bowen (1884), 111 U. S. 776, 781; Worcester v. Western R. Co., 4 Met. 564; Railroad Commissioners v. Portland, etc. R. Co., 63 Me. 269, 278, 279, 18 Am. Rep. 208. Cf. Furness v. Caterham Ry. Co., 25 Beav. 614, 27 Beav. 358; Myatt v. St. Helena Ry. Co., 2 Q. B. 364.

<sup>26</sup> Beach on Railways, § 699, citing Sage v. Memphis, etc. R. Co., 125 U. S. 361; Railroad Commissioners v. Portland, etc. R. Co., 63 Me. 269 (1872), 18 Am. Rep. 208; Stevens v. Davison, 18 Grat. 819, 98 Am. Dec. 692. And see, generally, Overton v. Memphis, etc. R. Co., 10 Fed. Rep. 866; Meyer v. Johnston, 53 Ala. 237; Kelly v. Trustees, etc., 58 Ala. 489; Milwaukee, etc. R. Co. v. Scudder, 2

Wall. 510; Wallace v. Loomis, 97 U. S. 146. A receiver will be appointed for a railroad only as an adjunct to the enforcement of the equitable rights of the parties, and never merely to manage the property at the instance of parties dissatisfied with its control. American Loan & Trust Co. v. Toledo, etc. Ry. Co., 29 Fed. Rep. 416, 420; Beach on Receivers, § 328. Cf. Brandt v. Allen (1888), 76 Iowa, 50; Jones v. Bank of Leadville (1888), 10 Colo. 464, 17 Pac. Rep. 272; People v. Albany, etc. R. Co., 24 N. Y. 261, 82 Am. Dec. 295; People v. Long Island, etc. R. Co., 31 Hun, 127; State v. Hartford, etc. R. Co., 29 Conn. 538; State v. West Wisconsin R. Co., 36 Wis. 466; State v. Southern Minnesota R. Co., 18 Minn. 40.

For example, in Connecticut the principle was invoked to justify the overruling of the efforts of a minority to resist foreclosure and a subsequent reorganization for the purpose of continuing the property in legitimate use.<sup>27</sup>

**§ 1189. Jurisdiction of the courts. Interstate corporations.** As a general rule the court which first acquires jurisdiction of the *res*, or subject-matter, will retain jurisdiction until the end of the litigation, its possession and control of the property being exclusive of interference by other courts.<sup>28</sup> A decree foreclosing a mortgage upon corporate property in the federal circuit court for one district, is not invalid because a part of the property is situate in another district and State.<sup>29</sup> Where a State court does not take possession or control of property in a suit, a suit involving the same subject-matter may be brought and maintained in the federal court.<sup>30</sup> A suit pending in a State court to restrain sale of the property, or bill asking for a receiver, is no bar to foreclosure suit in a federal court.<sup>31</sup> Federal courts are prohibited by act of Congress from enjoining the appointment of a receiver by the State court, or other proceedings therein, but they may enjoin suits in their own courts.<sup>32</sup> And though a foreclosure suit is

<sup>27</sup> *Gates v. Boston, etc. R. Co.* R. Co., 23 Fed. Rep. 569. But see (*1885*), 53 Conn. 333. *Thompson v. Van Vechten*, 3 Duer, 618.

<sup>28</sup> *East Tennessee R. Co. v. Atlanta, etc. Ry. Co.* (1892), 49 Fed. 608; *Moran v. Sterges* (1894), 154 U. S. 256; *Holland, etc. Co. v. International, etc. Co.* (1898), 85 Fed. 865; *Appleton, etc. Co. v. Central Trust, etc. Co.* (1899), 93 Fed. 286; *Baltimore, etc. Ry. Co. v. Wabash Ry. Co.* (1902), 119 Fed. 678; *Beach on Receivers*, §§ 22, 23, 348; *Buck v. Colbath*, 3 Wall. 334, 342; *Union Trust Co. v. Rockford, etc. R. Co.*, 6 Biss. 197; *Conkling v. Butler*, 4 Biss. 22; *Bill v. New Albany, etc. R. Co.*, 2 Biss. 390; *Andrews v. Smith*, 19 Blatchf. 100; *Wilmer v. Atlanta, etc. R. Co.*, 2 Woods, 409; *Alden v. Boston, etc. R. Co.*, 5 Bankr. Reg. 230; *Milwaukee, etc. R. Co. v. Milwaukee, etc. R. Co.*, 20 Wis. 165, 88 Am. Dec. 735; *State v. Marietta & Cincinnati R. Co.*, 35 Ohio St. 154; *Ohio, etc. R. Co. v. Fitch*, 20 Ind. 498. Cf. *Jennings v. Philadelphia & Reading*

S. 444; *McElrath v. Pittsburgh, etc. R. Co.*, 55 Pa. St. 189; *Blackburn v. Selma, etc. R. Co.*, 2 Flip. 525;

*Wilmer v. Atlantic, etc. R. Co.*, 2 Woods, 409, 447; *Central Trust Co. v. Wabash, etc. R. Co.*, 29 Fed. Rep. 620; *Atkins v. Wabash, etc. R. Co.*, 29 Fed. Rep. 173; *Farmers' Loan & Trust Co. v. Chicago, etc. R. Co.*, 27 Fed. Rep. 148; *Hurd v. Savannah, etc. R. Co.*, 12 S. C. 314; *Randolph v. Wilmington, etc. R. Co.*, 11 Phila. 102.

<sup>29</sup> *Defiance, etc. Co. v. City of Defiance* (1900), 100 Fed. Rep. 178.

<sup>30</sup> *Pierce v. Feagans* (1889), 39 Fed. 587; *State Trust Co. v. National, etc. Co.* (1893), 72 Fed. 573.

<sup>31</sup> *Coeur d' Alene Ry., etc. Co. v. Spalding* (1899), 93 Fed. 280; *Iron Mountain R. R. Co. v. City of Memphis* (1899), 96 Fed. 113.

pending in the federal court, a bill, to declare the mortgage illegal, may be entertained by a State court.<sup>33</sup> For, the citizenship of the corporation rather than the situation of its property, determines the jurisdiction of the courts.<sup>34</sup> Accordingly a State court upon bill of foreclosure therein may order the sale and conveyance of property of the company which is situated or extends into another State.<sup>35</sup> And the purchaser will take free from all liens except such as may exist under the laws of the other State upon the part of the property lying therein.<sup>36</sup> Otherwise, mortgages of bridges over boundary rivers and of railways running through more than one State, would be comparatively insecure, because the property as well as the franchise of the corporation owning them, would be worthless if divided.<sup>37</sup> So also a federal court will not, at the instance of a mortgage creditor, restrain the enforcement of a judgment of a State court, obtained before foreclosure or the appointment of a receiver, against the mortgaged railway company, upon obligations incurred in the operation of its road.<sup>38</sup> And again, the rights of the judgment creditors of a railway company, who have established their liens in a State court, will not be prejudiced by a sale of the property in proceedings for foreclosure had in a federal court, they not having been joined as parties in the suit for foreclosure in the latter court.<sup>39</sup> A further example of this principle is in a case where a federal court was prayed to take ancillary jurisdiction in a case of foreclosure in an adjoining district, of property lying in both, and the prayer was refused.<sup>40</sup> But, on the other hand, where during the pendency of a suit in a State court to enforce a statutory lien on mortgaged property, for work done and material furnished, foreclosure proceedings are instituted in the United States court, and a receiver

<sup>33</sup> Gay v. Brierfield, etc. Co., 94 Ala. 303 (1891), 11 So. 353, 16 L. R. A. 564, 33 Am. St. Rep. 132.

<sup>34</sup> Muller v. Dows (1876), 94 U. S. 444; Copeland v. Memphis, etc. R. Co., 3 Woods, 659; St. Louis Nat. Bank v. Allen, 2 McCrary, 94, 5 Fed. Rep. 552; Penfield v. Chesapeake, etc. R. Co., 29 Fed. Rep. 495.

<sup>35</sup> McElrath v. Pittsburg, etc. R. Co., 55 Pa. St. 189; Muller v. Dows (1876), 94 U. S. 444.

<sup>36</sup> Hand v. Savannah, etc. R. Co. (1879), 12 S. C. 314. See, also,

Taylor v. Atlantic, etc. R. Co., 55 How. Pr. 275, 57 How. Pr. 26; *In re* United States Rolling Stock Co., 55 How. Pr. 286, 57 How. Pr. 16.

<sup>37</sup> Muller v. Dows (1876), 94 U. S. 444.

<sup>38</sup> Eells v. Johnson, 27 Fed. Rep. 327:

<sup>39</sup> Blair v. Walker, 26 Fed. Rep. 73.

<sup>40</sup> Mercantile Trust Co. v. Kanawha, etc. Ry. Co. (1889), 39 Fed. Rep. 337, 6 Ry. & Corp. L. J. 283.

is appointed and takes possession,—and the plaintiff in the first suit continues to prosecute it without obtaining leave of the latter court, and finally obtains judgment, and is decreed to be entitled to a lien for the amount due him upon the property,—the federal court will not entertain a petition to have that judgment declared a lien on the property in its receiver's hands, superior to the lien of a mortgage creditor.<sup>41</sup> The New York statute requiring an application for the appointment of a receiver to be made in the judicial district in which the principal office of the company is situated, does not apply to the case of a receiver appointed to take charge of mortgaged property pending foreclosure.<sup>42</sup>

*Interstate corporations.*—The court of one State can not, by its decree, or by a sale made under it, affect title to property without the limits of the State, even though such property be an interstate railroad, or telegraph system, because the court can not give possession after the foreclosure.<sup>43</sup> In the case of an interstate railroad running into two or more circuits of the United States courts, a suit to foreclose may be brought in any one of the circuits and it will decree a foreclosure of the whole lien.<sup>44</sup> A company was incorporated in Georgia and Alabama, having the same name and same incorporators, and the same set of officers who conducted the business as a single corporation. In both cases riparian rights were granted on the Chattahoochee River. The corporation had a dam and manufacturing plant built on the river and partly in each State. A mortgage afterward was executed on the property in the name of the corporation, without naming the State wherein it was incorporated, which property was afterward sold to a second corporation of Alabama, subject to the mortgage. Afterward suit to foreclose was brought in the federal court of Georgia, against the mortgagor and its successor in interest by the trustee, a citizen of Alabama, the defendants being alleged citizens of Georgia. *Held*, that the decree in foreclosure affected neither of the Alabama corporations, nor any of their property rights in that State, because neither one of the Alabama corporations could be defendant to the foreclosure suit without ousting the jurisdiction of the court.<sup>45</sup>

<sup>41</sup> *Blair v. St. Louis, etc. Ry. Co.*, 25 Fed. Rep. 2. 400; *Eaton, etc. R. R. v. Hunt*, 20 Ind. 457 (1863).

<sup>42</sup> *United States Trust Co. v. New York, etc. Ry. Co.*, 35 Hun, 341. 94 U. S. 444.

<sup>43</sup> *Farmers' L. & T. Co. v. Bankers' etc. T. Co.* (1887), 44 Hun, 45 Alabama, etc. Co. v. Riverdale, etc. Mills, 127 Fed. 497.

**§ 1190. Parties in suits to foreclose.**—The only necessary parties to the foreclosure suit are the mortagor corporation and the mortgagee, or his trustee.<sup>46</sup> In foreclosure suit by first mortgagee the second mortgagee should be made a party in order to cut off his right of redemption.<sup>47</sup>

*Bondholders* should not be made parties in a suit to foreclose a railroad mortgage given to trustees to secure the bonds.<sup>48</sup>

*Trustee.*—The trustee is the proper person to bring suit for foreclosure. The bondholders can not act, except upon his refusal, but request to the trustee to foreclose and his refusal is first necessary,<sup>49</sup> for the trustees represent the interests of all their bondholders, and their acts are binding upon them all.<sup>50</sup> Accordingly, although suit may have been begun by the bondholders, the trustees, unless their interests are adverse, will be allowed to come in and take charge of the further conduct of the case.<sup>51</sup> But any bondholder whose rights are endangered is entitled to be made a party to the action.<sup>52</sup> So, also, on a bill to adjudge a mortgage and the bonds thereunder void, the bondholders have been held to be necessary parties.<sup>53</sup>

*The stockholders* need not be made parties defendant, for a decree against the company is conclusive against them.<sup>54</sup> Upon the general principle that the sovereign can not be sued without his consent, a State which has indorsed the mortgage bonds need not be made a party to foreclosure proceedings.<sup>55</sup> A temporary receiver appointed in proceedings instituted by the attorney-general to dissolve a corporation on the ground of insolvency, is not a

<sup>46</sup> *Tug, etc. Co. v. Brigel*, 86 Fed. 818 (1898).

<sup>47</sup> *Chicago, etc. R. R. v. Fosdick* (1882), 106 U. S. 47; *Denton v. Ontario Co. Nat. Bank* (1896), 150 N. Y. 126.

<sup>48</sup> *Vose v. Bronson* (1867), 6 Wall. 452; *Shaw v. Little Rock, etc. R. Co.*, 100 U. S. 605; *Chicago, etc. R. Co. v. Howard*, 7 Wall. 392.

<sup>49</sup> *General Electric Co. v. La Grande, etc. Co.* (1898), 87 Fed. 590.

<sup>50</sup> *Shaw v. Little Rock, etc. R. Co.* (1879), 100 U. S. 605; *Credit Co. v. Arkansas Central R. Co.*, 5 *McCrary*, 30, 31, 15 Fed. Rep. 52, 53.

<sup>51</sup> *Richards v. Chesapeake, etc. R. Co.*, 1 *Hughes* (U. S. C. C.), 28.

The trustee of an income mortgage is a necessary party to a suit for an accounting. *Barry v. Missouri, etc. R. Co.*, 22 Fed. Rep. 631.

<sup>52</sup> *Ex parte De Betz*, 9 Abb. N. Cas. 246; *Anderson v. Jacksonville, etc. R. Co.*, 2 Woods, 628.

<sup>53</sup> *Appeal of Harrisburg, etc. R. Co.* (Pa. 1888), 15 Atl. Rep. 459, not officially reported.

<sup>54</sup> *Chicago, etc. R. Co. v. Howard*, 7 Wall. 392.

<sup>55</sup> *Davis v. Gray* (1872), 16 Wall. 203; *Young v. Montgomery, etc. R. Co.*, 2 Woods, 606. Cf. *Elliott v. Van Voorst*, 3 Wall. Jr. 299, as to the federal government as a party in foreclosure proceedings.

necessary party to a foreclosure suit brought by the mortgage creditors of the company; for as temporary receiver he is not vested with the title to the property of the corporation, and it is not divested of its property until final judgment of dissolution and the appointment of a final receiver.<sup>56</sup>

*The president* is not a necessary party to a foreclosure suit under the trust deed, where in the issue of bonds by the corporation for taking up the old bonds secured by the trust deed, and securing additional funds, the president retained the new bonds and used them as security in borrowing money for the corporation.<sup>57</sup>

**§ 1191. Holders of different liens as parties.**—Second mortgagees are not necessary parties to a foreclosure by the first mortgagees, except for the purpose of cutting off the right of redemption, which the former would otherwise retain.<sup>58</sup> And a second mortgagee, not a party to the bill of the first mortgagee, after sale and execution thereunder, can not have an injunction to restrain the sale,—as his rights are unaffected.<sup>59</sup> So also, in a suit by a junior mortgagee to foreclose a mortgage, prior mortgagees are not necessary parties,<sup>60</sup> especially where the bill seeks only a foreclosure of the equity of redemption.<sup>61</sup> For a sale in such a case would necessarily be made subject to the prior mortgages.<sup>62</sup> And a decree in favor of junior mortgagees, even adjudging their lien to be a first lien, does not give them precedence over a prior lien of a party without notice.<sup>63</sup> But in a suit for foreclosure of a second mortgage on a railroad, where a receiver is asked, the first mortgagee is a proper party; for in that case the *res* in the hands of the court and subject to sale—is the entire mortgaged property, and not merely the equity of redemption.<sup>64</sup> A junior mortgagee has a right to a receiver to collect the rents of the

<sup>56</sup> *Herring v. New York, etc. R. Co.*, 105 N. Y. 340, 371; *Beach on Railways*, § 697.

<sup>57</sup> *Unity Co. v. Equitable T. Co.* (1903), 204 Ill. 595, 68 N. E. 654.

<sup>58</sup> *Searles v. Jacksonville, etc. R. Co.* (1873), 2 Woods, 621.

<sup>59</sup> *Searles v. Jacksonville, etc. R. Co.* (1873), 2 Woods, 621.

<sup>60</sup> *Jerome v. McCarter* (1876), 94 U. S. 734; *Hogan v. Walker*, 14 How. 37; *Rose v. Page*, 2 Sim. 471; *Richards v. Cooper*, 5 Beav. 304; *Delabere v. Norwood*, 3 Swanst. 144.

<sup>61</sup> *Jerome v. McCarter* (1876), 97 U. S. 734; *Gihon v. Belleville*, 3 Halst. Eq. 531; *Williamson v. Probasco*, 4 Halst. Eq. 571.

<sup>62</sup> *Young v. Montgomery, etc. R. Co.* (1875), 2 Woods, 606; *Bronson v. La Crosse, etc. R. Co.*, 2 Wall. 283; *Howard v. Milwaukee, etc. R. Co.*, 7 Biss. 73.

<sup>63</sup> *Pittsburgh, etc. R. Co. v. Marshall* (1877), 85 Pa. St. 187.

<sup>64</sup> *Miltenberger v. Logansport, etc. R. Co.* (1882), 106 U. S. 286.

mortgaged premises for his benefit, pending a suit to foreclose brought by a senior mortgagee, to which he is made a party.<sup>65</sup> Prior mortgagees can be made parties only by service of process or voluntary appearance, but if they are represented by trustees who are parties, a notice calling upon them to present their claims to the master is effectual and the decree binds them.<sup>66</sup>

**§ 1192. Intervention. Who may intervene as parties.**— Senior mortgagees will not be allowed to intervene in an action for the foreclosure of a junior mortgage.<sup>67</sup> Second mortgage bondholders, expressly holding subject to the first mortgage, can not attack validity.<sup>68</sup> If second mortgagees seek to set aside a sale under the first mortgage for irregularity, they must first tender par value to the first mortgage bondholders for their bonds, where they bid in the property, although for less than the first mortgage debt.<sup>69</sup> The trustee represents all the bondholders. They are bound by his conduct of the foreclosure proceedings and

<sup>65</sup> Beach on Railways, § 697, citing Washington, etc. Ins. Co. v. Fleischauer, 20 Hun, 117. The common-law rule defining the rights of junior and senior mortgagees, where the first mortgagee is in possession, was early stated by Lord Eldon, as follows: "If a man has a legal mortgage, he cannot have a receiver appointed; he has nothing to do but to take possession. If he has only an equitable mortgage, that is, if there is a prior mortgagee, then if the prior mortgagee is not in possession, the other may have a receiver without prejudice to his taking possession; but, if he is in possession you cannot come here for a receiver; you must redeem him, and then in taking the accounts, he will not be allowed any sums that he may have paid over to the mortgagor after notice of the subsequent incumbrance." So long as anything is due, in one case it was said, if even a sixpence is due, the receiver will be refused, and the question whether anything is due cannot be tried on motion. But it should clearly appear that

something is due, and if the accounts of the mortgagee are so incomplete that he cannot determine definitely whether or not anything is due, the court will allow the motion to stand over in order to allow him to find out the amount, and if he fail to show any, the court may assume that nothing is due and act accordingly. Berney v. Sewell, 1 Jac. & W. 647; Rowe v. Wood, 2 Jac. & W. 553; Hiles v. Moore, 15 Beav. 175; Codrington v. Parker, 16 Ves. 469; Faulkner v. Daniel, 10 L. J. (N. S.) Ch. 33; Quinn v. Brittain, 3 Edw. Ch. 314; Bolles v. Duff, 35 How. Pr. 481; Boston & Providence R. Co. v. New York & N. E. R. Co., 12 R. I. 220; Norway v. Rowe, 19 Ves. 144; Chambers v. Goldwin, cited in 13 Ves. 377.

<sup>66</sup> Young v. Montgomery, etc. R. Co. (1875), 2 Woods, 606.

<sup>67</sup> *Ex parte McHenry* (1878), 9 Abb. N. Cas. 256.

<sup>68</sup> Central Trust Co. v. Columbus, etc. Ry. (1898), 87 Fed. 815; Singer, etc. Co. v. Barnard, etc. Co. (1900), 113 Iowa, 664.

<sup>69</sup> Cunningham v. Macon, etc. R. R. (1895), 156 U. S. 400.

may not intervene, except in case of his collusive or other fraudulent action.<sup>70</sup> Nor can the shareholders intervene unless there be fraud or collusion on the part of the corporate officers having the management of the case.<sup>71</sup> Neither can unsecured creditors intervene in foreclosure proceedings.<sup>72</sup> Thus in a suit to foreclose a railroad mortgage, the court being satisfied that money lent by a bank, an intervening creditor, at a time when the company was much embarrassed and shortly before the commencement of the suit, went into the general funds of the company, and not especially to the payment of interest, and that there was no fraud or deception on the part of the trustees, and no misuse of current income by the receiver of the road to the injury of the bank,—held that the bank had only the rights of a general creditor in the distribution of the proceeds of the sale of the mortgaged property.<sup>73</sup> But where a railroad and its entire property was mortgaged to secure an issue of bonds, and general creditors sued the company and threatened to attach rolling stock, and an outside party gave an indemnity bond under which he was compelled to pay the claim against the company, which in turn gave him a mortgage upon certain locomotives, upon foreclosure of the general mortgage—he will be protected in his outlay, since it enabled the company to keep up as a going concern and resulted finally in supplying the receiver with means which he turned over to the purchasing bondholders.<sup>74</sup> And in the case of rolling-stock in use upon a railroad under a car-trust agreement, if it is retained and used by the receiver in a foreclosure suit, the owners may intervene in the foreclosure suit, and they will be awarded reasonable rent therefor upon the ground that the use was for the benefit of the realty, and necessary for the continued operation of the railway as a “going concern,” in the maintenance of which the

<sup>70</sup> Toler v. East Tennessee, etc. Ry. Co. (1894), 67 Fed. Rep. 168.

U. S. 251; Fosdick v. Schall, 99 U. S. 235.

<sup>71</sup> Bronson v. La Crosse, etc. R. Co., 2 Black, 524; Forbes v. Memphis, etc. R. Co., 2 Woods, 323. But see Chouteau v. Allen, 70 Mo. 290.

<sup>74</sup> Union Trust Co. v. Morrison (1888), 125 U. S. 591; Fosdick v.

<sup>72</sup> Herring v. New York, etc. R. Co. (1887), 105 N. Y. 340, 370; Stoute v. Lye, 103 U. S. 66; Condee v. Lord, 2 N. Y. 269, 51 Am. Dec. 294; Bronson v. La Crosse R. Co., 2 Black, 524.

Schall, 99 U. S. 235; Miltenberger v. Logansport R. Co., 106 U. S. 286; Union Trust Co. v. Souter, 107 U. S. 591; Burnham v. Bowen, 111 U. S. 776; Union Trust Co. v. Illinois, etc. R. Co., 117 U. S. 434; Dow v. Memphis, etc. R. Co., 124 U. S. 652; Sage v. Memphis, etc. R. Co., 125 U. S. 361.

<sup>73</sup> Penn v. Calhoun (1887), 121

public generally is interested.<sup>75</sup> A judgment creditor may intervene in the suit and contest validity of the bonds.<sup>76</sup> The State cannot intervene to attack the legality of the mortgage and bonds,<sup>77</sup> nor to maintain suit for injunction.<sup>78</sup> The corporation itself, the mortgagor, may file bill to enjoin foreclosure and for cancellation of certain bonds for fraud in their issue.<sup>79</sup> The receiver may attack the mortgage for fraud or other illegality.<sup>80</sup>

*The stockholders.*—In case of collusive or fraudulent foreclosure, any stockholder may intervene as a defendant and set up the defenses the corporation ought to have set up.<sup>81</sup> Persons becoming creditors subsequent to issue of the bonds, can not attack their validity on ground of their issue for less than par value,<sup>82</sup> nor because the debt exceeds the statutory limit.<sup>83</sup>

**§ 1193. Foreclosure by bondholders. Right of trustee to foreclose. Refusal of trustee of second mortgage to foreclose.** If the trustees refuse or neglect to act at the request of the bondholders upon breach of the conditions of the mortgage, any bondholder may institute suit for himself and all who wish to come in with him.<sup>84</sup> So if the trustees are dead, the bondholders themselves may sue.<sup>85</sup> In order to maintain their action, however, the bondholders must prove that they are *bona fide* holders and owners of bonds secured by the mortgage,<sup>86</sup> and must show clearly

<sup>75</sup> Kneeland v. American, etc. Co. (1890), 136 U. S. 89; Farmers' etc. Co. v. Chicago, etc. R. Co. (1889), 42 Fed. Rep. 6. (1895), 70 Fed. 803; State v. Holmes (Neb. 1900), 82 N. W. 109, Central T. Co. v. California, etc. Ry. (1901), 110 Fed. 70.

<sup>76</sup> Hamilton v. Menominee, etc. Co., 106 Wis. 352.

<sup>77</sup> Beach v. Wakefield (1898), 107 Iowa, 567.

<sup>78</sup> Webb v. Vermont Central R. Co. (1882), 20 Blatchf. 218, where the trustees had acquired adverse interests, Wilmer v. Atlanta, etc. R. Co., 2 Woods, 447; Alexander v. Central, etc. R. Co., 3 Dill. 487; Wutgen v. St. Paul, etc. R. Co., 4 Hun, 529; March v. Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732; Mason v. York, etc. R. Co., 52 Me. 82; Jessup v. City Bank, 14 Wis. 331.

<sup>79</sup> Galveston, etc. R. Co. v. Cowdrey, 11 Wall. 459.

<sup>80</sup> Jessup v. City Bank, 14 Wis. 331.

<sup>77</sup> State v. Farmers' etc. Co., 81 Tex. 530 (1891).

<sup>78</sup> State v. Guaranty, etc. Co., 73 Fed. 914 (1896).

<sup>79</sup> Gunnison, etc. Co. v. Whitaker (1898), 91 Fed. 191; Louisville, etc. Ry. Co. v. Louisville Trust Co. (1899), 174 U. S. 552.

<sup>80</sup> See v. Heppenheimer (1897), 55 N. J. Eq. 240; State Trust Co. v. Casino Co. (1896), 5 N. Y. App. Div. 381.

<sup>81</sup> Koehler v. Black River, etc. Co. (1862), 2 Blackf. 715; Guarantee, etc. Co. v. Duluth, etc. Ry.

that the trustees have neglected or refused to act upon a request properly made.<sup>87</sup> In proceedings by the bondholders, the trustees must be joined as parties defendant, and duly served with process.<sup>88</sup> Where a corporation conveyed property to trustees to secure mortgage bonds, and before default, certain of the bondholders and one of the trustees instituted proceedings based on the insolvency of the corporation, and caused a judicial sale to be had; and afterwards the remaining trustees and bondholders objected to a confirmation of the sale, and demanded to be made parties to the proceedings,—it was held that the sale should be set aside, and that the other bondholders should be made parties according to their request.<sup>89</sup> If the mortgage is made directly to the bondholders by name, any one of them can bring his suit in foreclosure by joining all as parties.<sup>90</sup>

*Trustee for bondholders. Right to foreclose.*—The fact that the corporation has power to make calls upon the shareholders for unpaid instalments, in no way affects the right of the trustee for mortgage bondholders to foreclose and sell the security on default by the corporation.<sup>91</sup> In case of insolvency of the corporation, the trustee is not bound to wait until a fund deposited to pay interest is entirely exhausted, before foreclosing the security.<sup>92</sup> A corporation, by its mortgage or deed of trust, may empower the trustees to foreclose upon default, without written request of any party in interest, and without resort to judicial proceedings, and themselves advertise and sell the property without appraisement. Such sale is a perpetual bar against the mortgagor and all other claimants of the mortgaged premises, although they were bought in, at their own sale, by the trustees for the benefits of the bondholders.<sup>93</sup>

*Second mortgage. Refusal of trustees to foreclose.*—Where the trustees are the same in the first and second mortgages, where

<sup>87</sup> Knapp v. Railroad Co. (1873), 20 Wall. 117; Galveston R. Co. v. Cowdrey, 11 Wall. 459; Campbell v. Railroad Co., 1 Woods, 368.

<sup>88</sup> Wutgen v. St. Paul, etc. R. Co., 4 Hun, 529; Morgan v. Kansas Pac. R. Co., 15 Fed. Rep. 55.

<sup>89</sup> Coann v. Atlanta Cotton Factory Co., 14 Fed. Rep. 4.

<sup>90</sup> Nashville, etc. R. Co. v. Orr (1873), 18 Wall. 471; Chicago, etc. R. Co. v. Howard, 7 Wall. 392, holding, however, that he cannot

sue for himself and others who may choose to come in. He must name them as parties.

<sup>91</sup> Land, etc. Co. v. Asphalt Co., etc. (N. J. 1903), 127 Fed. 1 (U. S., C. C. A.).

<sup>92</sup> Land, etc. Co. v. Asphalt Co., etc. (N. J. 1903), 127 Fed. 1 (U. S., C. C. A.).

<sup>93</sup> Etna Coal, etc. Co. v. Martin, etc. Co. (Ohio, 1904), 127 Fed. 32 (U. S., C. C. A.).

the second may be foreclosed on default in the first mortgage, and the trustee refuses to foreclose the second mortgage,—on such default any holder of bonds under the second mortgage, may foreclose it for the benefit of all the bondholders.<sup>94</sup>

**§ 1193a. Respective rights of majority and minority bondholders.**—It is often provided in bonds and mortgages that any bondholder may consider the principal due upon default in the payment of any coupon for a certain time, usually six months.<sup>95</sup> It is more usually provided in corporate mortgages, that upon default in payments of interest the trustees shall enter and take possession of the property upon the request of a majority of the bondholders.<sup>96</sup> But none of the bondholders can appropriate the security to themselves, or impair its value to the others.<sup>97</sup> For each bondholder enters into contract relation with each and all of his co-bondholders. His right to appropriate the security in satisfaction of his bond in such lawful manner as he may choose, is modified by the same right in every other holder. His absolute right of control is limited not only by the express provisions of the bond and mortgage, but also in great measure by the peculiar nature and character of the security.<sup>98</sup> And to allow a small minority of bondholders, representing a comparatively insignificant amount of the mortgage debt, in the absence of any pretense even of fraud or unfairness, to defeat the wishes of an overwhelming majority of those associated with them in the benefits of their common security,—would be to ignore entirely the relation which bondholders, secured by a mortgage, bear to each other.<sup>99</sup> It follows, therefore, that if there are differences of opinion among the bondholders as to what their interests require, it is not improper that the trustee should be governed by the voice of the majority, acting in good faith and without collusion.<sup>1</sup> And, of

<sup>94</sup> *Baker v. Consolidated, etc. Co.* (1903), 85 N. Y. S. 830, 42 Misc. Rep. 95.

<sup>95</sup> *Gates v. Boston, etc. R. Co.* (1885), 53 Conn. 333.

<sup>96</sup> *Beekman v. Hudson River, etc. Ry. Co.* (1888), 35 Fed. Rep. 3, 4 Ry. & Corp. L. J. 220; *State v. Brown*, 64 Md. 199; *First Nat., etc. Ins. Co. v. Salisbury* (1881), 130 Mass. 303. *Cf.* 8 Vic., ch. 16, § 53. But these provisions have been held not to preclude the mortgage trustees from foreclosing in a proper case without waiting for

the request of the bondholders, which is a provision in addition to the usual rights of the trustee in his discretion to foreclose upon default. *First Nat., etc. Ins. Co. v. Salisbury* (1881), 130 Mass. 303.

<sup>97</sup> *Jackson v. Ludeling* (1874), 21 Wall. 616.

<sup>98</sup> *Canada, etc. R. Co. v. Gebhard*, 109 U. S. 534.

<sup>99</sup> *Shaw v. Little Rock, etc. R. Co.* (1879), 100 U. S. 605.

<sup>1</sup> *Shaw v. Little Rock, etc. R. Co.* (1879), 100 U. S. 605.

course, where the mortgage provides that the bonds may be considered due by any bondholder on default in payment of interest, a majority having availed themselves of the condition, a small minority should not be allowed to thwart their action by electing not to consider their bonds as due.<sup>2</sup> So, also, where suit was brought by a small minority of the bondholders, upon default in payment of interest, the principal debt having several years to run, it was held that dissenting bondholders should be allowed to purchase the bonds of those wishing to foreclose, and thereby put an end to the proceedings.<sup>3</sup> After a default has occurred, a majority of the bondholders may instruct the trustees to waive it, but an attempt on their part to waive future defaults and instruct the trustees to give an extension upon all the coupons for a number of years, so that the sums required for interest upon the bonds may be applied in improvements to the company's road,—is illegal.<sup>4</sup> And a dissenting bondholder may sue for the amount of his past-due coupons, notwithstanding the fact that the majority in interest have waived the rights secured to them by the mortgage.<sup>5</sup> There is no restriction upon the right of the coupon-holder to sue, without assent of a majority of the bondholders, except when advantage is sought to be taken of the default as advancing the date when the principal becomes due.<sup>6</sup> The suit can in any event be sustained for interest due.<sup>7</sup> And even though the mortgage deed expressly prohibit the trustees from declaring the principal due upon default in payment of an interest instalment, and from entering upon the property or foreclosing for the principal sum before the maturity of the bonds, unless requested to do so by the holders of a majority of them,—it has been decided that they may foreclose for a failure to pay interest, at the request of a single bondholder.<sup>8</sup>

**§ 1194. Foreclosure on default of payment of interest.—** Where a mortgage is security for interest as well as principal, it

<sup>2</sup> Gates v. Boston, etc. R. Co., 53 Conn. 333 (1885); Shaw v. Little Rock, etc. R. Co. (1879), 100 U. S. 605, 612.

<sup>3</sup> Tillinghast v. Troy, etc. R. Co. (1888), -48 Hun, 420. In this case the bonds were above par in the market.

<sup>4</sup> McClelland v. Norfolk, etc. R. Co. (1888), 110 N. Y. 469, 6 Am. St. Rep. 397.

<sup>5</sup> Manning v. Norfolk, etc. R. Co., 29 Fed. Rep. 838.

<sup>6</sup> Beekman v. Hudson River, etc. R. Co. (1888), 35 Fed. Rep. 3, 11.

<sup>7</sup> Beekman v. Hudson River, etc. R. Co. (1888), 35 Fed. Rep. 3, 11; Chicago, etc. R. Co. v. Fosdick, 106 U. S. 47.

<sup>8</sup> Farmers' Loan & Trust Co. v. Chicago, etc. Ry. Co., 27 Fed. Rep. 146. *Vide supra*, § 1160, RESPECTIVE RIGHTS OF MAJORITY AND MINORITY.

may be foreclosed on default in payment of the interest, in the absence of any special provision on that subject.<sup>9</sup> And the right to foreclose for default in payment of interest having been established, a receiver may be appointed at the instance of the bond-holders.<sup>10</sup> Accordingly, where the interests involved demand a sale, upon a default in payment of interest, before maturity of the principal, the court may so decree, although such a course is not authorized by the terms of the mortgage,<sup>11</sup> and even though the principal does not fall due upon default in payment of interest.<sup>12</sup> So also, stipulations in corporate mortgages for the sale of the property upon default in payment of interest, are construed to contemplate but one sale, and unless the property is capable of division without material injury, it must be sold in its entirety, although no part of the principal be yet due.<sup>13</sup> But if the deed does not provide that the principal sum shall become due upon default in payment of interest, and the property is capable of division without material injury, the court may direct a sale of so much thereof as is sufficient to pay the interest, or it may order the property to be leased and the interest to be paid out of the rental arising therefrom.<sup>14</sup> Or the decree may order the mortgaged property to be sold, and the proceeds, after payment of costs and the interest then due, to be paid into court for the purpose of meeting future instalments of interest and the principal sum upon maturity.<sup>15</sup> Thus, where there is no provision, either in a bond or in the mortgage by which it is secured, or elsewhere, that the bond shall become due, or may be declared due, on the happening of some event prior to the date of maturity, it is error for a court of equity to decree the unpaid balance of the bond to be due when in fact it has not matured, although the mortgaged property has been sold on foreclosure, and the proceeds applied to the payment of the interest and principal, on default of interest, as

<sup>9</sup> Mercantile Trust Co. v. Missouri, etc. R. Co. (1888), 36 Fed. Rep. 221, 4 Ry. & Corp. L. J. 362.

<sup>10</sup> Hopkins v. Worcester, etc. Proprietors, L. R. 6 Eq. 437; Brassey v. New York, etc. R. Co., 19 Fed. Rep. 663; Williamson v. New Albany, etc. R. Co., 1 Biss. 198, and Tysen v. Wabash, etc. Ry. Co., 8 Biss. 247; American Loan & Trust Co. v. Toledo, etc. R. Co., 29 Fed. Rep. 416.

<sup>11</sup> McLane v. Placerville, etc. R. Co., 66 Cal. 606.

<sup>12</sup> Howell v. Western R. Co. (1876), 94 U. S. 463.

<sup>13</sup> Wilmer v. Atlantic, etc. R. Co., 2 Woods, 447.

<sup>14</sup> Bardstown, etc. R. Co. v. Metcalf, 4 Met. (Ky.) 199, 81 Am. Dec. 541.

<sup>15</sup> Howell v. Western R. Co. (1876), 94 U. S. 463.

provided by the mortgage.<sup>16</sup> And if the intention is clear that the bonds were not to become due before the specified date of maturity, the proceeds of sale, after the satisfaction of the accrued amount, may be properly applied upon the outstanding liability.<sup>17</sup> But upon payment of the whole amount of interest due, the company may demand a surrender of its property after the trustees have entered, if there be nothing in the deed to the contrary and the principal is not yet due.<sup>18</sup> The bondholders do not waive their right to consider the principal as due, by accepting payment of a part of the interest coupons.<sup>19</sup>

**§ 1195. Receivers in foreclosure proceedings.**—A receiver may be appointed either upon the application of the company itself,<sup>20</sup> the shareholders<sup>21</sup> or of creditors, whether secured or unsecured.<sup>22</sup> A receiver will be appointed on behalf of the mortgagee where the corporation is unable or unwilling to pay the interest on its bonds, or is insolvent and interest is in arrears.<sup>23</sup> The appointment is not a matter of right. The power to appoint is discretionary with the court.<sup>24</sup> A judgment creditor of a railroad corporation upon return of an execution unsatisfied, or in the absence of it, may have a receiver appointed, as neither the road nor the company's right of redemption can be sold on execution.<sup>25</sup> A court of equity has no power to appoint a receiver except in a pending suit.<sup>26</sup> No party interested on either side will be appointed unless both consent.<sup>27</sup> One corporation may be receiver for another.<sup>28</sup> The title of the receiver dates from time of grant-

<sup>16</sup> Ohio Central R. Co. v. Central Trust Co. (1890), 133 U. S. 83, 7 Ry. & Corp. L. J. 182.

<sup>17</sup> Ohio Central R. Co. v. Central Trust Co. (1890), 133 U. S. 83, 7 Ry. & Corp. L. J. 182; Chicago, etc. R. Co. v. Fosdick, 106 U. S. 47, 68.

<sup>18</sup> Union Trust Co. v. Missouri, etc. Ry. Co., 26 Fed. Rep. 485.

<sup>19</sup> Northampton National Bank v. Kidder, 106 N. Y. 221, 229, 60 Am. Rep. 443.

<sup>20</sup> Wabash, etc. Ry. Co. v. Central Trust Co., 22 Fed. Rep. 272; Central Trust Co. v. Wabash, etc. Ry Co, 29 Fed. Rep. 618, 623. See Atkins v. Wabash Ry. Co., 29 Fed. Rep. 161.

<sup>21</sup> Merryman v. Carroll, etc. Co., 4 Ry. & Corp. L. J. 12; Lawrence v. Greenwich Fire Ins. Co., 1 Paige, 587. See, also, Sheppard v.

Oxenford, 1 Kay & J. 491; Evans v. Coventry, 5 De G., M. & G. 911.

<sup>22</sup> *Vide infra*, § 1222, as to appointment of receivers at instance of unsecured creditors; and as to appointment at instance of mortgagees, *vide supra*, § 1187.

<sup>23</sup> Farmers', etc. Co. v. Winona, etc. Ry. (1893), 59 Fed. Rep. 957; Ft. Wayne, etc. Co. v. Franklin, etc. Co. (1898), 57 N. J. Eq. 7.

<sup>24</sup> Pennsylvania Co. v. Jacksonville, etc. Co. (1893), 55 Fed. 134.

<sup>25</sup> Dickerman v. Northern, etc. Co. (1900), 176 U. S. 181.

<sup>26</sup> *In re Brant* (1899), 96 Fed. 257.

<sup>27</sup> Woods v. Oregon, etc. Co. (1893), 55 Fed. 901.

<sup>28</sup> Kimmerle v. Dowagaic Manuf. Co. (1895), 105 Mich. 640.

ing the order of appointment.<sup>29</sup> A court of equity will not appoint a receiver where the party applying therefor has an adequate remedy at law.<sup>30</sup> And in making an appointment the court does not go into the merits of the case generally.<sup>31</sup> For a receiver is a ministerial officer of a court of chancery, appointed as an indifferent person between the parties to a suit merely to take possession of and preserve, *pendente lite*, the fund or property in litigation, when it does not seem equitable to the court that either party should have possession or control of it.<sup>32</sup> He holds the property for the benefit of all the parties interested.<sup>33</sup> His title and possession is that of the court,<sup>34</sup> and any attempt to disturb his possession is contempt and punishable accordingly.<sup>35</sup> Under

<sup>29</sup> East Tenn. etc. Ry. v. Atlanta, etc. Ry. (1892), 49 Fed. 608.

<sup>30</sup> Beach on Railways, § 700, citing Milwaukee, etc. R. R. Co. v. Soutter, 2 Wall. 510, 523; Winkler v. Winkler, 40 Ill. 179; Mullen v. Jenkins, 1 Stockt. 192; Sherman v. Clark, 4 Nev. 138, 97 Am. Dec. 516; Coughron v. Swift, 18 Ill. 414; Poage v. Bell, 3 Rand. 586; Webster v. Couch, 6 Rand. 519; Wooden v. Wooden, 2 Green's Ch. 429; Parmly v. Tenth Ward Bank, 3 Edw. Ch. 395; Sollory v. Leaver, L. R. 9 Eq. 22; Cremen v. Hawkes, 2 Jones & Lat. 674; Corey v. Long, 43 How. Pr. 497; Speights v. Peters, 9 Gill, 476; Morrison v. Buckner, Hemp. 442; Riœ v. St. Paul & Pacific R. Co., 24 Minn. 464.

<sup>31</sup> Skinners Co. v. Irish Soc., 1 Mylne & Cr. 162; Conro v. Gray, 4 How. Pr. 166.

<sup>32</sup> Beach on Railways, § 695, citing Wyatt's Prac. Reg. 335; Chautauqua Bank v. White, 6 Barb. 584; Portman v. Mills, 8 L. J. (N. S.) Ch. 161; Delaney v. Mansfield, 1 Hogan, 234; Booth v. Clark, 17 How. 322; Green v. Bostwick, 1 Sandf. (N. Y.) Ch. 185; Skinner v. Maxwell, 66 N. C. 45, 68 N. C. 400; Battle v. Davis, 66 N. C. 252; Coburn v. Ames, 57 Cal. 201; Hunt v. Wolfe, 2 Daly, 303; Corey v. Long, 43 How. Pr. 497, 12 Abb. Pr. (N. S.) 427; Deverdorff v. Dickinson, 21 How. Pr. 275;

Ellicott v. Warford, 4 Md. 80; Hooper v. Winston, 24 Ill. 353; Kaiser v. Kellar, 21 Iowa, 95; Iddings v. Bruen, 4 Sandf. Ch. 417; *In re Burke*, 1 Ball & B. 74; Fairfield v. Weston, 2 Sim. & S. 98; Bryan v. Cormick, 1 Cox, 422; Field v. Jones, 11 Ga. 413; Broad v. Wickham, 1 Smith's Ch. Pr. 500; Angel v. Smith, 9 Ves. 335; Curtis v. Leavitt, 10 How. Pr. 481; Lottimer v. Lord, 4 E. D. Smith, 183; Davis v. Marlborough, 2 Swanst. 125; Verplanck v. Mercantile Insurance Co., 2 Paige, 438, 452; 1 Grant's Chancery Practice (2d ed.), 298; Beach on Receivers, § 2.

<sup>33</sup> Skip v. Harwood, 3 Atkins, 564; *In re Colvin*, 3 Md. Ch. 278; Ellicott v. Warford, 4 Md. 80; Iddings v. Bruen, 4 Sandf. Ch. 417; Beach on Receivers, § 4, citing First Nat. Bank v. Barnum Wire & Iron Works (1886), 60 Mich. 489, (1885), 58 Mich. 315; Delaney v. Mansfield, 1 Hog. 234.

<sup>34</sup> De Visser v. Blackstone, 6 Blatchf. 235; Robinson v. Atlantic & Great Western Ry. Co., 66 Pa. St. 160; Angel v. Smith, 9 Ves. 335; Ohio, etc. R. Co. v. Fitch, 20 Ind. 498; Ellicott v. Warford, 4 Md. 80; Albany City Bank v. Schermerhorn, 9 Paige, 372. Cf. Covell v. Heyman, 111 U. S. 176.

<sup>35</sup> Walling v. Miller, 108 N. Y. 173, 2 Am. St. Rep. 400, annotated; Beverley v. Brooke, 4 Grat. 187,

modern statutes the receiver's powers are now more extensive than formerly.<sup>36</sup> He may sue and be sued;<sup>37</sup> may collect unpaid subscriptions to the capital stock.<sup>38</sup>

*Powers.*—He may bring suits in other State courts or in the federal courts. He may sue in courts of another State only by the comity of States, and by showing that no domestic creditors can be injured.<sup>39</sup> A suit pending when he is appointed may proceed without him.<sup>40</sup> A receiver *pendente lite* has only the powers expressly conferred by the court.<sup>41</sup> The court may authorize the receiver to borrow money and pledge corporate property for that purpose, in order to preserve and protect the property during the receivership,<sup>42</sup> and to issue receiver's certificates for payment of current corporate expenses.<sup>43</sup> The receiver is not personally liable for any liabilities incurred by him as receiver.<sup>44</sup> His only liability is for his own misconduct or neglect.<sup>45</sup> He may enter into new contracts under authority of the court, to conserve the property;<sup>46</sup> may employ counsel, and is entitled to compensation for his own

211; *Noe v. Gibson*, 7 Paige, 513; *Hull v. Thomas*, 3 Edw. Ch. 236; *De Visser v. Blackstone*, 6 Blatchf. 235; *Secor v. Toledo*, etc. Ry. Co., 7 Biss. 513; *King v. Ohio*, etc. R. Co., 7 Biss. 529; *Spinning v. Ohio Life Ins. & Trust Co.*, 2 Disney, 368; *Vermont & Canada R. Co. v. Vermont Central R. Co.*, 46 Vt. 792; *Langford v. Langford*, 5 L. J. (N. S.) Ch. 60; *Broad v. Wickham*, 4 Sim. 511; *Skip v. Harwood*, 3 Atk. 564; *Anonymous*, 2 Mod. 499; *Beach on Receivers*, § 237.

<sup>36</sup> *Verplanck v. Mercantile Ins. Co.*, 2 Paige, 453; *Hooper v. Wins-ton*, 24 Ill. 363; *Grant v. City of Davenport*, 18 Iowa, 194; *Davis v. Gray*, 16 Wall. 219; *Yeager v. Wallace*, 44 Pa. St. 294; *Runyon v. Farmers' & Mechanics' Bank*, 3 Green (N. J.), 480; *Cooney v. Cooney*, 65 Barb. 524.

<sup>37</sup> *Beach on Railways*, §§ 735, 736, citing *Coope v. Bowles*, 28 How. Pr. 10, 42 Barb. 87; *Griffin v. Long Island R. Co.*, 102 N. Y. 449; *Curtis v. McIlhenny*, 5 Jones Eq. (N. C.) 290.

<sup>38</sup> *Beach on Receivers*, §§ 669, 670, citing *Dayton v. Borst*, 31 N.

Y. 435; *Nathan v. Whitlock*, 9 Paige, 152; *Frank v. Morrison*, 58 Md. 423; *Cutting v. Damerel*, 88 N. Y. 410; *Mean's Appeal*, 85 Pa. St. 293. But he has no power to enforce statutory liabilities. *Farnsworth v. Wood*, 91 N. Y. 308. And he has no greater power than the corporation had to collect subscriptions. *Billings v. Robinson*, 94 N. Y. 415, 28 Hun, 122. Cf. *Cleveland v. Burnham*, 55 Wis. 598.

<sup>39</sup> *Rogers v. Reley* (1896), 80 Fed. 759.

<sup>40</sup> *Kittredge v. Osgood* (1894), 161 Mass. 384.

<sup>41</sup> *Decker v. Gardner* (1891), 124 N. Y. 334, 11 L. R. A. 480.

<sup>42</sup> *Park v. New York*, etc. R. R. (1894), 64 Fed. 190.

<sup>43</sup> *Kent v. Lake Superior Co.* (1892), 144 U. S. 75.

<sup>44</sup> *McNulta v. Lochbridge* (1891), 141 U. S. 327.

<sup>45</sup> *Davenport v. Alabama*, etc. Ry. (1875), 2 Woods, 519.

<sup>46</sup> But he can not bind the trust by contract without the authority of the court. *Lehigh Coal*, etc. Co. v. Central R. Co., 35 N. J. Eq.

and his counsel's services.<sup>47</sup> The court fixes his compensation. The allowance is generally five per cent. of receipts and disbursements.<sup>48</sup> The trustee who brings the suit for foreclosure is entitled to compensation for his actual service and disbursements and counsel fees.<sup>49</sup> The receiver's expenses and counsel fees are payable out of the body of the property.<sup>50</sup> The fees of receiver's attorney are a prior charge against the property.<sup>51</sup>

*Removal, discharge of receiver.*—The court may discharge a receiver at any time and there can be no appeal from its decision.<sup>52</sup> Upon tender, by the mortgagor, of payment of the debt for which the foreclosure suit is brought, the court is bound to discharge the receiver.<sup>53</sup> Where suit in foreclosure is brought by a trust company, and receiver appointed, the debts and expenses incurred by him in excess of proceeds realized upon foreclosure of sale, must be paid by the trust company.<sup>54</sup>

§ 1196. *Defenses of mortgagor. Estoppel to set up irregularity.*—No other or further defenses are allowed in an action to foreclose a mortgage to secure negotiable corporate bonds which were transferred to a *bona fide* holder for value, than would be allowed in an action at law upon other like negotiable instruments.<sup>55</sup> Accordingly a bill to foreclose a mortgage executed to a life insurance company to secure payment of a bond, is not subject to demurrer for failing to show affirmatively the capacity of the company to lend money and take mortgages,<sup>56</sup> nor because

426, 429. See also Beach on Receivers, §§ 257, 361. Cf. *In re Louisiana, etc. Deposit Co.* (1888), 40 La. Ann. 514; *Cowdrey v. The Railroad*, 1 Wood, 331, 336, where it is said that in practice it has been found that the receiver must be allowed a certain discretion in matters of detail in operating railroads, in order that he may discharge his duties to the best advantage. The court has power, on consulting the receivers, and without notice to the mortgagees, to order the lease of another road which is found necessary to the profitable management of the mortgaged property. *Mercantile Trust Co. v. Missouri, K. & T. Ry. Co.* (1890), 41 Fed. Rep. 8.

<sup>47</sup> Beach on Railways, §§ 747, 748.

<sup>48</sup> *William v. Morgan* (1884), 111 U. S. 684; *Wright v. Knoxville, etc. Co.* (1900), 59 S. W. 677.

<sup>49</sup> *Woodruff v. New York, etc. Ry.* (1891), 129 N. Y. 27; *Bound v. South Carolina Ry.* (1894), 59 Fed. 509.

<sup>50</sup> *Central Trust Co. v. Thurman* (1894), 94 Ga. 735, 20 S. E. 141.

<sup>51</sup> *Pennsylvania Co. etc. v. Jacksonville, etc. Ry.* (1899), 93 Fed. 60.

<sup>52</sup> *Walters v. Anglo, etc. Co.* (1892), 50 Fed. 316.

<sup>53</sup> *Milwaukee R. R. v. Soutter* (1864), 2 Wall. 510.

<sup>54</sup> *Chapman v. Atlantic T. Co.* (1902), 119 Fed. 257.

<sup>55</sup> *Kenicott v. Wayne County* (1872), 16 Wall. 452; *Carpenter v. Longan*, 16 Wall. 271.

<sup>56</sup> *Boulware v. Davis* (Ala.

it was not shown that the agent of a foreign insurance company had not complied with an act requiring him to procure a certificate of authority from the auditor, before transacting any business of insurance.<sup>57</sup> So also on foreclosure of a railroad mortgage, neither the minority stockholders, nor any one not a stockholder at the time of the illegal transactions, can maintain a bill alleging in defense of the foreclosure the mismanagement of the affairs of the corporation in the interest of the principal bondholder and stockholder, and usury in the negotiation of the bonds, where no demand upon, or refusal by, the director's or stockholders to make the defense, is averred, and no excuse for not doing so is made, except that the officials are in collusion with the persons seeking the foreclosure.<sup>58</sup>

*Estoppel of mortgagor to set up irregularity.*—The mortgaging corporation, having issued bonds for money and property which it retains, is estopped to set up irregularity in execution of the mortgage for the purpose of defeating it.<sup>59</sup>

§ 1197. Decree of sale in foreclosure.—The proceeding for a foreclosure is in the nature of a remedy *in rem* and not *in personam*, and the trustees have no right to enforce the bonds in any way except that provided in the mortgage, and are confined to realizing upon the security thereof.<sup>60</sup> In the State courts, they are not entitled to a personal judgment against the company for any deficiency that may remain after sale and application of the trust property.<sup>61</sup> And in an action to foreclose mortgages given to secure advances, it is error to include in the judgment a sum sufficient to satisfy advances in excess of the amount of the mortgages.<sup>62</sup> But the federal equity rule provides, that in suits in equity for the foreclosure of mortgages, "a decree may be rendered for any balance that may be found due to the complainant, over and above the proceeds of the sale or sales." Yet this does not authorize a deficiency decree, unless the bill shows that the amount

" is actually due.<sup>63</sup> A decree upon suit for default in interest pay-

1890), 8 Ry. & Corp. L. J. 412; Alabama Gold Life Ins. Co. v. Central, etc. Assn., 54 Ala. 73.

<sup>57</sup> Boulware v. Davis (Ala. 1890), 8 Ry. & Corp. L. J. 412.

<sup>58</sup> Alexander v. Searcy (1889), 81 Ga. 536.

<sup>59</sup> Big Creek, etc. Co. v. American, etc. Co. (Tenn. 1904), 137 Fed. 625 (U. S. C. C. A.),

<sup>60</sup> Welsh v. St. Paul, etc. R. Co. (1879), 25 Minn. 314, 322.

<sup>61</sup> Welsh v. St. Paul, etc. R. Co. (1879), 25 Minn. 314, 323.

<sup>62</sup> McComb v. Barcelona Apartment Assn. (1890), 10 N. Y. Supp. 546; McComb v. Cordova Apartment Assn. (1890), 10 N. Y. Supp. 552.

<sup>63</sup> Ohio, etc. R. Co. v. Central Trust Co. (1890), 133 U. S. 83, 7 Ry. & Corp. L. J. 182, construing Equity Rule, No. 92.

ments, should declare the fact, nature and extent of the default which constitutes the breach of the condition of the mortgage, and the amount then due, a substantial error in which will vitiate the proceedings, and allow a reasonable time for payment;—upon which further proceedings will be suspended until default again occurs.<sup>64</sup> The decree in foreclosure proceedings in which a railway is to be sold, should name an “upset-price” sufficiently large to cover costs, all allowances made by the court, receiver’s certificates and interest, liens prior to the bonds, amounts diverted from the earnings, and all undetermined claims which will be settled before the confirmation and sale.<sup>65</sup> And where a trustee for bondholders forecloses, and one of the bondholders has had the full amount of his bonds guaranteed by the others, it is error, against his objection, for the court to direct the trustee to bid in the property for the full amount of all the bonds.<sup>66</sup> It is proper to make a decree of sale subject to the rights and equities of parties to the suit, under liens or judgments claimed by them, and to reserve those rights for further adjudication.<sup>67</sup> In strict foreclosure a decree for a sale and for the enforcement of the agreement for purchase contained in the deed, is appropriate under the prayer for general relief.<sup>68</sup> A foreclosure of all of several mortgages on railroad property, and a sale of the property entire, will not be ordered by one decree of the court.<sup>69</sup>

**§ 1198. Binding effect of the decree.**—Although a decree entered by consent of the parties in interest may be set aside at any time before it is executed,<sup>70</sup> one which has been entered in the usual course of judicial proceedings, after a trial of the cause, can not be vacated except upon the ground of fraud and circumvention.<sup>71</sup> It is of binding effect upon all the parties in interest

<sup>64</sup> Chicago, etc. R. Co. v. Fosdick (1882), 106 U. S. 47; Howell v. Western R. Co., 94 U. S. 463.

<sup>65</sup> Blair v. St. Louis, etc. Co., 25 Fed. Rep. 232.

<sup>66</sup> Sanxey v. Iowa City Glass Co. (1886), 63 Iowa, 707.

<sup>67</sup> Sage v. Central R. Co. (1878), 99 U. S. 334.

<sup>68</sup> Sage v. Central R. Co. (1878), 99 U. S. 334.

<sup>69</sup> Wabash, etc. R. Co. v. Central Trust Co., 22 Fed. Rep. 138.

<sup>70</sup> Union Bank v. Marin, 3 La. Ann. 54; Vermont, etc. R. Co. v. Vermont Central R. Co., 50 Vt. 500; Wadham v. Gay, 73 Ill. 415.

<sup>71</sup> Leavenworth County v. Chicago, etc. Ry. Co. (1885), 25 Fed. Rep. 219; Matthews v. Murchison, 15 Fed. Rep. 691; Graham v. Boston, etc. R. Co. (1885), 118 U. S. 161; Ward v. Montclair R. Co., 26 N. J. Eq. 260. A bill by second mortgagees for a rescission of a foreclosure sale is demurrable where there is no allegation of actual fraud, or that the property was sold for less than its value, nor offer to redeem. Robinson v. Iron Ry. Co. (1890), 135 U. S. 522. The mortgage trustees are indispensable parties to suits to set aside the foreclosure. Ribon v.

who had or are affected with notice, and can not be collaterally attacked.<sup>72</sup> And a judgment in a suit against the mortgagee trustees is binding upon the bondholders, unless they can show fraud or connivance on the part of their trustees.<sup>73</sup> Accordingly underlying bondholders represented in the suit by their trustees, can not, after the sale and partial execution of the contract, attack the disposition of the earnings prior to the decree and change the rights of the purchasers.<sup>74</sup> So also the purchasers at foreclosure sale who are not required to pay an amount in excess of their bid, have no appealable interest in decree adjudging to whom payment should be made.<sup>75</sup> Nor can they appeal from a decree of sale subject to specified liens.<sup>76</sup> And in this case the sufficiency of the proceedings in the foreclosure suit prior to the sale, can not be questioned.<sup>77</sup> But the judgment in an action on coupons does not bar the same parties in action upon other coupons from the same bonds.<sup>78</sup> And under a rule providing that where the bill is

Chicago, etc. R. Co., 16 Wall. 446; Meyer v. Utah, etc. R. Co., 3 Utah, 280. *Cf.* Thayer v. Life Assn., 112 U. S. 720; Evans v. Texas, 11 Biss. 178; Mitchell v. Tillotson, 12 Fed. Rep. 738. An action to set aside the foreclosure is not barred by the previous refusal to make the suing shareholders parties (*Tazewell County v. Farmers'*, etc. Co., 12 Fed. Rep. 752), for it is not a continuance of the original proceedings. *Pacific R. Co. v. Missouri Pacific R. Co.*, 3 Fed. Rep. 772. And when the decree is vacated, the complainant is placed in his former position. *Osborn v. Michigan*, etc. R. Co., 2 Flip. 503.

<sup>72</sup> *Graham v. Boston*, etc. R. Co. (1885), 118 U. S. 161; *Appeal of Huston* (1889), 127 Pa. St. 620; *Herring v. New York*, etc. R. Co. (1887), 105 N. Y. 341, 371; *Grignon v. Astor*, 2 How. 319. But a decree is not binding upon parties without notice. *Pittsburgh*, etc. R. Co. v. *Marshall*, 85 Pa. St. 187; *Beach on Railways*, § 687, saying that a decree is final as between the parties with respect to the questions thereby decided or which might have been brought up in

the suit, and those matters can not be again brought in issue between the same parties, unless it appear that the successful party has wrongfully prevented the other party from presenting his case fully; and citing *Brooks v. O'Hara Bros.*, 2 McCrary, 644; *Aurora City v. West*, 7 Wall. 82, 102; *Vermont*, etc. R. Co. v. *Vermont Central R. Co.*, 50 Vt. 500; *Woods v. Pittsburgh*, etc. R. Co., 99 Pa. St. 101; *Wood's Ry. Law*, 1636; 2 *Taylor on Evidence*, § 1513.

<sup>73</sup> *Campbell v. Railroad Co.*, 1 Woods, 368. *Acc. Huntington v. Little Rock*, etc. R. Co., 16 Fed. Rep. 906, where the bondholders had been heard from time to time in the suit.

<sup>74</sup> *Central Trust Co. v. Wabash R. Co.*, 30 Fed. Rep. 332.

<sup>75</sup> *Central Trust Co. v. Grant Locomotive Works* (1890), 135 U. S. 207, 7 Ry. & Corp. L. J. 502; *Stuart v. Gay*, 127 U. S. 518.

<sup>76</sup> *Swann v. Wright*, 110 U. S. 590, 601.

<sup>77</sup> *Robinson v. Iron Ry. Co.* (1890), 135 U. S. 522.

<sup>78</sup> *Town of Enfield v. Jordan*, 119 U. S. 680.

taken *pro confesso* the case may be proceeded with *ex parte*, and the matter of the bill may be decreed by the court, the defendant is not precluded on appeal from contesting the sufficiency of the bill, or from insisting that the averments in it do not justify the decree, although he can not question the evidence.<sup>79</sup>

*Impeachment*.—The judgment against the corporation can be impeached only for fraud,—and collusion, or for want of jurisdiction.<sup>79a</sup>

*Impeachment of judges*.—Impeachment proceedings are exceedingly rare. Since the foundation of the federal government, only five judges of United States' courts have been impeached. Judge Chase in 1804, one of the justices of the United States Supreme Court, was impeached by the house of representatives and acquitted by the senate. His impeachment was a mistake and arose almost entirely from political opposition. In the case of Judge Pickering of New Hampshire, a little over a century ago, there being evidence of insanity, impeachment proceedings were necessary to remove him from office, and the senate accordingly found him guilty of the charge of intemperance and using profane words on the bench. Judge Peck of Missouri, in 1831, was impeached for punishing a lawyer who had criticized one of his opinions harshly. The senate acquitted him by an overwhelming vote. Judge Humphreys of Tennessee, in war time in 1862, was convicted by the senate of having joined the Confederacy and taking up arms against the United States, without having resigned his place on the bench. In a purely formal manner, he was removed from office by unanimous vote of the senate, to permit nomination of his successor in a legal manner. And in the fifth case, Judge Swayne of Florida, in 1905, was impeached by the house of representatives. The charges of irregularities in conduct of his court arose from political grounds, and the trial was a farce, the senate unanimously acquitting him. Of these cases, only five in over a century, not a single one was involved in any criminal charges or charge which directly affected the honesty or personal good character of the judge. Thus the record of the federal judiciary has been an extremely good one. And in the State courts, similarly, few cases of impeachment have resulted in conviction for any turpitude.

<sup>79</sup> Ohio, etc. R. Co. v. Central Trust Co. (1890), 183 U. S. 83, 7 Ry. & Corp. L. J. 182.

<sup>79a</sup> *Vide*, 49 L. R. A. 353, 3 Am. St. Rep. 858, 15 Fed. Rep. 360.

§ 1199. Sale under the decree. Who may bid. Setting aside the sale. Fraudulent sale.—It is with the mortgage trustees to elect, whether the sale shall be made under a decree pending an appeal, and to choose the time therefor; and they will not be compelled by *mandamus* to have the property sold.<sup>80</sup> The court entering decree in foreclosure, will enjoin pending suits, as well as subsequent suits, of parties who are such to the decree involving the same subject.<sup>81</sup> The time and terms of the sale are within the discretion of the court.<sup>82</sup> Where the property is depreciating and becoming incumbered with receiver's certificates, a sale will not be postponed at the request of a minority interest, contrary to the judgment of the trustees, and the decree may order the sale of the whole property together, subject to settlement of conflicting rights after the sale.<sup>83</sup> The court may delay the sale for the interests of all parties.<sup>84</sup> The receiver in his discretion may postpone the sale.<sup>85</sup> Although the court ordering the sale of corporate property will take the responsibility, if necessary, of delaying a sale to await a better condition of the finances and business of the company; yet where the increasing prosperity would require several years to pay the interest already due, and there is no guaranty that the prosperity will continue, the court will not postpone the sale.<sup>86</sup> Where provision was made in a deed of trust, executed by a railway company to secure its bonds, for a sale in case of a default in payment of any of its bonds, and it was further made the duty of the trustees, under such circumstances, to sell upon the request of a majority in interest of the bondholders, the court refused to postpone the sale until the number of bonds due could be determined.<sup>87</sup> At a public judicial sale, either party, as a rule, may bid.<sup>88</sup> The attorney for the foreclosing trustee is disqualified to buy for himself and others.<sup>89</sup> A purchase at the

<sup>80</sup> *Vide supra*, § 739, SALE UNDER FORECLOSURE DECREE; Farmers', etc. Co. v. Central R. Co. (1877), 4 Dill. 533.

<sup>81</sup> *Central Trust Co. v. Western, etc. R. R.* (1898), 89 Fed. 24.

<sup>82</sup> *Columbia, etc. Co. v. Kentucky, etc. Ry.* (1894), 60 Fed. 794.

<sup>83</sup> *First National Bank v. Shedd* (1886), 124 U. S. 74, 86.

<sup>84</sup> *American, etc. Co. v. Union Depot Co.* (1896), 80 Fed. 36; *Bieber-White Co. v. White River, etc. R. R.* (1901), 110 Fed. 472; *Old*

*Colony T. Co. v. Great, etc. Co.* (Mass. 1902), 63 N. E. 945; *Toler v. East Tennessee, etc. Ry.* (1894), 67 Fed. Rep. 168.

<sup>85</sup> *Bethlehem Iron Co. v. Philadelphia, etc. Ry.* (1892), 49 N. J. Eq. 356.

<sup>86</sup> *Duncan v. Atlantic, etc. R. Co.*, 4 Hughes, 125.

<sup>87</sup> *State v. Brown*, 64 Md. 199.

<sup>88</sup> *Pewabic Min. Co. v. Mason* (1892), 145 U. S. 349.

<sup>89</sup> *Kreitzer v. Croyatt* (1894), 94 Ga. 694, 21 S. E. 585.

sale by the trustee for himself, is voidable by the mortgagor if prejudiced thereby.<sup>90</sup> And as to sale in parcels, where there are several separate properties to be sold it is proper to put up for sale each of them separately and then all together, and if the highest bid for the whole in gross exceeds the aggregate of the highest separate bids, to strike off and sell the entirety to the person making the bid.<sup>91</sup> But not where the whole was sold as ordered by the decree directing its sale as a whole to which neither party objected.<sup>92</sup> Where the highest bidder does not pay, and the property is delivered to the next highest bidder, no resale is necessary.<sup>93</sup> The purchaser at foreclosure sale is now generally, by the decree in foreclosure, made liable for all claims against the receiver.<sup>94</sup> In case the proceeds of a foreclosure sale is less than the full face value of the series of bonds, each bondholder takes a part equal to the proportion between the amount of his bond and that of the whole series.<sup>95</sup> For, all the bonds secured by a mortgage are deemed to have been issued at the same time, and there is no priority in favor of the holders of the bonds bearing the lower numbers.<sup>96</sup> Accordingly in the case of an invalid power of sale, in the deed under which the mortgaged property was sold, the proceeds must be applied to the payment of the debt to each and all of the bondholders alike.<sup>97</sup> And the proceeds are to be divided in proportion to the full value of the bonds, without regard to the amount which their holders may have paid for them.<sup>98</sup> But where a person holds bonds merely as collateral for a debt due him from the corporation, he is entitled to receive in the distribution only the amount of his debt.<sup>99</sup> The surplus, after paying the

<sup>90</sup> Copsey v. Sacramento Bank (1901), 133 Cal. 659, 85 Am. St. Rep. 238.

<sup>91</sup> Union Trust Co. v. Illinois, etc. R. Co. (1885), 117 U. S. 435, 474.

<sup>92</sup> Central Trust Co. v. Sheffield etc. Ry. (1894), 60 Fed. 9; Nevada, etc. v. National, etc. Co. (1900), 103 Fed. 391.

<sup>93</sup> Coler v. Barth (1897), 24 Colo. 31, 48 Pac. 656.

<sup>94</sup> Houston, etc. Ry. v. Norris (Tex. 1897), 41 S. W. 708; Baltimore, etc. R. R. v. Burris (1901), 111 Fed. 882.

<sup>95</sup> Barry v. Missouri, etc. R. Co. (1887), 34 Fed. Rep. 829, 4 Ry. &

Corp. L. J. 198; Hodges' Appeal, 84 Pa. St. 359; Brinkerhoff v. Lansing, 4 Johns. Ch. 65; Pomroy v. Rice, 16 Pick. 22; Watkins v. Hill, 8 Pick. 522; Dana v. Binney, 7 Vt. 501; Clafin v. Railroad Co., 4 Hughes, 12; Pinkard v. Allen, 75 Ala. 73.

<sup>96</sup> Stanton v. Alabama, etc. R. Co., 2 Woods, 523.

<sup>97</sup> Mason v. New York, etc. R. Co. (1861), 52 Me. 82.

<sup>98</sup> Duncombe v. New York, etc. R. Co., 84 N. Y. 190.

<sup>99</sup> Rice's Appeal (1875), 79 Pa. St. 168; Jesup v. City Bank (1861), 14 Wis. 331; Ackerson v. Lodi, etc. R. Co. (1877), 542.

mortgage debt, is to be applied to the other liens upon the railway.<sup>1</sup> And, generally, on a sale for default in interest, the proceeds will be applied, first to the arrears of interest, then to the mortgage debt, then to the junior incumbrances, according to their respective priority of lien, and the surplus—to the mortgagor.<sup>2</sup> If the debenture holder has been paid out of the judgment, he can not be brought back and treated as a trustee.<sup>3</sup>

*Inadequacy of price* is not ground for setting aside the sale, unless fraud or unfairness be shown.<sup>4</sup> Where the amount of debts to which the property was subject in the hands of the purchaser, is greater than the amount represented by the receiver, the purchaser may be relieved by the court from his bid.<sup>5</sup> The purchaser is not liable to pay the receiver's certificates, unless it is so provided in the decree.<sup>6</sup>

*Fraudulent sale in foreclosure of mortgage.*—A common form of fraud by directors is by collusive failure to defend a foreclosure suit, although the corporation has a good defense, and to purchase the property upon foreclosure sale, thus acquiring it for a nominal consideration. Any such sale will be set aside in equity, upon proof of the fraud, at the suit of any injured stockholder.<sup>7</sup> Where the corporation has a leasehold and a director has the fee, and induces the board to permit a forfeiture of the lease by non-payment of the rent, the company being in funds sufficient for such payment, such forfeiture will be set aside in equity at the suit of a stockholder injured by the fraud.<sup>8</sup>

**§ 1200. Rights and liabilities of purchaser at foreclosure sale.**—The purchaser at foreclosure sale is now generally made liable by the decree for all claims against the receiver, after his discharge.<sup>9</sup> A reorganized corporation as purchaser at foreclosure sale in foreclosure of the old corporation, is not liable to

<sup>1</sup> Railroad Co. v. Howard, 7 Wall. 392.

<sup>2</sup> Chicago, etc. R. Co. v. Fosdick (1882), 106 U. S. 47.

<sup>3</sup> Fountaine v. Carmathen Ry. Co., 5 Eq. 316, 324.

<sup>4</sup> Fidelity, etc. Co. v. Mobile, etc. Ry. Co. (1893), 54 Fed. Rep. 26; Bethlehem Iron Co. v. Philadelphia, etc. Ry. (1892), 49 N. J. Eq. 356; Fidelity, etc. Co. v. Roanoke, etc. Ry. (1899), 98 Fed. 475; Weston v. Chapman (1894), 76 Hun,

592; Pewabic Min. Co. v. Mason (1892), 145 U. S. 349.

<sup>5</sup> Grand Trunk Ry. v. Central Vt. R. R. (1900), 103 Fed. 740.

<sup>6</sup> Interstate Nat. Bank v. O'Dwyer (1896), 15 Tex. Civ. App. 33.

<sup>7</sup> Guarantee, etc. Co. v. Duluth, etc. R. R. (1895), 70 Fed. 803.

<sup>8</sup> Hannerty v. Standard Theatre Co. (1892), 109 Mo. 297.

<sup>9</sup> Texas, etc. Ry. v. Cox (1892), 145 U. S. 593; McNulta v. Lochbridge (1891), 141 U. S. 327.

general creditors. Their rights are cut off by the foreclosure, unless the decree makes provision in their behalf.<sup>10</sup> The rights and liabilities of the purchaser at the sale, are measured by the terms and conditions of the decree. Unless it makes him liable, he is not liable for claims against the receiver, not even by subsequent change in the decree.<sup>11</sup> If the decree frees the purchaser from receiver's claims or certificates, the lien will attach to the proceeds of the foreclosure sale.<sup>12</sup> Proceedings in the State court will be enjoined by the federal court, where by its decree of foreclosure the purchaser is required to pay such claims as it may direct.<sup>13</sup> The purchaser at foreclosure sale does not take money and surplus earnings in the hands of the receiver—they go to the bond-holders.<sup>14</sup> He does not take the income pending his delay in completing the purchase.<sup>15</sup> The purchaser is not liable for accidents, or negligence after the sale, while the property was in the hands of a receiver.<sup>16</sup> The purchaser is liable on a contract of lease of railroad, where he continues to use it.<sup>17</sup> The purchaser is not liable for agreement to give life-passes of which he had no notice.<sup>18</sup> The purchaser is not liable for debts of the old company, under statute giving to a reorganized company all the powers of the old corporation.<sup>19</sup> The purchaser is not liable on contracts or debts, made subsequent to the mortgage foreclosed.<sup>20</sup> Where a

<sup>10</sup> Brockert v. Iowa Central Ry. (1894), 93 Iowa, 132; Fernschild v. Yuengling, etc. Co. (1898), 154 N. Y. 667; Central Trust Co. v. Georgia, etc. Ry. (1898), 87 Fed. 288; Mercantile, etc. Co. v. St. Louis Ry. (1900), 99 Fed. 485; Howe v. St. Clair (1894), 8 Tex. Civ. App. 101, 27 S. W. 800; Grand Trunk Ry. v. Central, etc. R. R. (1900), 103 Fed. 740; Merriman v. Chicago, etc. R. R. (1894), 64 Fed. 535.

<sup>11</sup> Chicago, etc. R. R. v. McCammon (1894), 61 Fed. 772; Bound v. South Car. Ry. (1893), 58 Fed. 473.

<sup>12</sup> Mercantile Trust Co. v. Kanawha, etc. Ry. (1893), 58 Fed. 6.

<sup>13</sup> Stewart v. Wisconsin, etc. R. R. (1902), 117 Fed. 782; Jesup v. Wabash, etc. Ry. (1890), 44 Fed. 663; Fidelity, etc. Co. v. Norfolk, etc. Ry. (1898), 88 Fed. 815; Cen-

tral Trust Co. v. Western, etc. (1898), 89 Fed. 24.

<sup>14</sup> Washington, etc. Co. v. California, etc. Co. (1902), 115 Fed. 20.

<sup>15</sup> Boyle v. Farmers' L. & T. Co. (1898), 88 Fed. 930.

<sup>16</sup> Archambeau v. New York, etc. R. R. (1896), 170 Mass. 272; Holman v. Galveston, etc. Ry. (1896), 14 Tex. Civ. App. 499.

<sup>17</sup> Jacksonville, etc. v. Louisville, etc. R. R. (1894), 150 Ill. 480; St. Joseph, etc. v. Chicago, R. I. etc. Ry. (1898), 89 Fed. 648; Michigan Central R. R. v. Chicago, etc. Ry. (Mich. 1903), 93 N. W. 882; Frank v. New York, etc. R. R. (1890), 122 N. Y. 197.

<sup>18</sup> Missouri, etc. Ry. v. Henrie (1896), 5 Kan. App. 614, 46 Pac. 970.

<sup>19</sup> National, etc. v. Oconto, etc. Co. (1899), 105 Wis. 48.

<sup>20</sup> Ellis v. Boston, etc. R. R. (1871), 107 Mass. 36.

company procures a foreclosure sale and reorganization, and buys and holds the property secretly by trustee, a judgment creditor may levy an execution on the property.<sup>21</sup> An individual may purchase at the foreclosure sale, and convey the property to a new corporation.<sup>22</sup>

**§ 1201. Purchase by the bondholders, and stockholders for reorganization.**—The courts favor the participation of stockholders with bondholders in the purchase of the property at foreclosure sale, for the purpose of reorganization of the company.<sup>23</sup> At foreclosure sale the trustee for purpose of reorganization may bid in the property for the bondholders, for amount of the mortgaged debt and interest, but not to the advantage of one bondholder over another.<sup>24</sup> The trustee furthering any such advantage, is guilty of breach of trust.<sup>25</sup> The trustee buying in the property must do so for equal benefit of all the bondholders. He can not buy for himself.<sup>26</sup> Sale at foreclosure to reorganizing bondholders, will not be set aside, for any lack of notice to, or participation in the purchase by creditors or junior bondholders, where the property sold for a fair price.<sup>27</sup> The holder of receiver's certificates given upon his agreement to carry out reorganization plan, is bound thereby, though his agreement is not in writing.<sup>28</sup> Bondholders surrendering their old bonds in exchange for new ones in the reorganized corporation, will participate equally with the bondholders who did not make like exchange of their bonds.<sup>29</sup> In the absence of proof of actual fraud, a railroad owning majority of the stock of another, may purchase the property of the latter at foreclosure sale.<sup>30</sup> Though a large contingent fee accrued to the president of a corporation, his acts were held not constructively fraudulent, where he successfully promoted a plan for reorganization, involving the foreclosure and sale and purchase of its property, whereby interest in the property was preserved to the

<sup>21</sup> *State v. McBride* (1891), 105 Mo. 265.

<sup>22</sup> *Parker v. Elmira, etc. R. R.* (1901), 165 N. Y. 274; *Gray v. Massachusetts* (1898), 171 Mass. 116.

<sup>23</sup> *Platt v. Philadelphia, etc. R. R.* (1894), 65 Fed. 872.

<sup>24</sup> *Cushman v. Bonfield* (1891), 139 Ill. 819.

<sup>25</sup> *Sullivan v. Haskin* (1898), 70 Vt. 487.

<sup>26</sup> *Pewabic Min. Co. v. Mason* (1892), 145 U. S. 349; *Mareck v. Minneapolis T. Co.* (1898), 74 Minn. 538.

<sup>27</sup> *Central Trust Co. v. Peoria, etc. Ry.* (1902), 118 Fed. 30.

<sup>28</sup> *Cox v. Stokes* (1898), 156 N. Y. 491.

<sup>29</sup> *Anthony v. Campbell* (1901), 112 Fed. 212.

<sup>30</sup> *Rothchild v. Memphis, etc. R. R.* (1902), 113 Fed. 476.

stockholders.<sup>31</sup> Stockholders may purchase at sale in foreclosure for purpose of reorganization, and the representative of a stockholder may purchase, although the purpose of the new corporation was to continue an unlawful combination in restraint of trade.<sup>32</sup> The sale will be set aside for agreement of the receiver and mortgage trustee with third persons to secretly advertise in order that the property may be bought at a very low price by such third persons.<sup>33</sup> And where the trustee of the mortgage combined with bondholders to purchase at the sale at a small price, and to reorganize at a sacrifice to minority bondholders.<sup>34</sup> A minority stockholder is entitled to his proportion of the new stock, issued by the corporation, reorganized by majority of the stockholders buying at foreclosure sale and selling to the new company.<sup>35</sup> A reorganization scheme involving foreclosure and sale, where the bondholders and stockholders shared in certain proportions the bonds of the new corporation, was held fraudulent as to other creditors, to the extent of the bonds delivered to the stockholders.<sup>36</sup> Purchasing bondholders may turn in their bonds in payment at proper valuation. This in law is considered the same as payment in cash.<sup>37</sup> Bonds—of the old company exchanged for those of the reorganized corporation, are not cancelled so as to give priority to holders of junior mortgages.<sup>38</sup> Bondholders who join in foreclosure sale, purchase and reorganization of the corporation, waive their rights to the old bonds.<sup>39</sup> A majority of the stockholders are, in equity, trustees for the minority, and though they may be against purchase at the sale, and reorganize, they must do so in good faith toward the minority, otherwise the sale may be set aside, at the suit of any injured stockholder.<sup>40</sup>

<sup>31</sup> Symmes v. Union Trust Co. (1894), 60 Fed. 830.

<sup>32</sup> Olmsted v. Distillery, etc. Co. (1895), 73 Fed. Rep. 44.

<sup>33</sup> Atkins v. Judson (1898), 33 N. Y. App. Div. 42.

<sup>34</sup> Sahlgard v. Kenedy (1880), 2 Fed. 295.

<sup>35</sup> Cutting v. Baltimore, etc. R. R. (1901), 35 N. Y. Misc. 616.

<sup>36</sup> Railroad Co. v. Howard (1868), 7 Wall. 392.

<sup>37</sup> Rumsey v. People, etc. Ry. (1899), 154 Mo. 215; Moran v. Hagerman (1894), 64 Fed. 499; Mercantile Trust Co. v. Kanawaha,

etc. Ry. (1893), 58 Fed. 6; American Waterworks Co. v. Farmers' L. & T. Co. (1896), 73 Fed. 956.

<sup>38</sup> United States Rubber Co. v. Cincinnati, etc. Ry. (1892), 58 Fed. 500.

<sup>39</sup> Trust Nat. Bank v. Radford Trust Co. (1897), 80 Fed. 569; Central Trust Co. v. Cincinnati, etc. Ry. (1892), 58 Fed. 500.

<sup>40</sup> Mason v. Pewabic Mining Co., 145 U. S. 349, 133 U. S. 50; Farmers', etc. Co. v. New York, etc. Co., 150 N. Y. 410, 55 Am. St. Rep. 689; Olmstead v. Distilling, etc. Co., 73 Fed. 44.

The directors or other managing officers of a corporation may purchase at a foreclosure sale induced by others, if the transaction is free from fraud and conducted in good faith, and the property is not sold at a sacrifice on account of their interest in the purchase.<sup>41</sup> But they occupy a fiduciary relation to the stockholders, bondholders, and other creditors, and in equity will not be allowed to profit by violation of duty to any of them. In any case of collusive or wrongful sale, it will be set aside in equity.<sup>42</sup>

**§ 1202. Transfer of the property to a new corporation.**—A majority of the stockholders authorizing a sale of the property of a corporation, in order to reorganize it, can not purchase at the sale, to the prejudice of other stockholders. Nor can any of the directors or managing officers purchase at such sale.<sup>43</sup> Where, upon the expiration of the charter of a corporation, it is extended for purpose of winding up the corporate business, neither the directors nor a majority of the shareholders can sell the property to a new corporation, of which they are directors and stockholders,—on their arbitrary estimate of its value, and compel a dissenting majority to accept their proportion in money on such estimate, or in stock in the new corporation, in exchange for their shares in the old.<sup>44</sup> A minority of the bondholders, secured by a mortgage, have no right to enter into an agreement to purchase the railroad and mortgaged property at the lowest possible price, for the exclusive benefit of the parties to the agreement, with no reference to the other bondholders.<sup>45</sup> Those who hold fiduciary positions in the corporation, can not acquire the corporate property in a manner adverse to the interests of their trust beneficiaries, and can not become the purchasers of the property directly or indirectly at a foreclosure sale, nor participate in an arrangement to obtain the corporate property at the lowest possible figure.<sup>46</sup> Whenever the trustee in any case, buys in the property and transfers it to a

<sup>41</sup> *McKittrick v. Arkansas, etc. Co.*, 152 U. S. 473; *Englehardt v. Thousand Island Hotel Co.*, 109 N. Y. 454; *Saltmarsh v. Spaulding*, 147 Mass. 224; *Lucas v. Friant*, 111 Mich. 426; *Hill v. Nisbet*, 100 Ind. 341; *Foster v. Belcher, etc. Co.*, 118 Mo. 238.

<sup>42</sup> *Jackson v. Ludeling*, 21 Wall. (U. S.) 616.

<sup>43</sup> *Cumberland, etc. v. Sherman*, 30 Barb. (N. Y.) 553; *Hoffman*,

*etc. Coal Co. v. Cumberland, etc. Co.*, 16 Md. 456.

<sup>44</sup> *Mason v. Pewabic Mining Co.*, 133 U. S. 50.

<sup>45</sup> *Jackson v. Ludeling*, 21 Wall. 616.

<sup>46</sup> *Hoyle v. Plattsburgh, etc. Ry. Co.* (1873), 54 N. Y. 314; *Jackson v. Ludeling*, 21 Wall. 616, 625; *Munson v. Syracuse, etc. R. Co.*, 29 Hun, 76; *Harts v. Brown*, 77 Ill. 226. But see *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587.

new corporation, it must be for the benefit of all the bondholders entitled thereto,<sup>47</sup> and he must sell to the reorganized corporation provided in the mortgage or deed of trust. He can not transfer the property to any other corporation without unanimous consent of the bondholders,—without liability for value of his bonds to anyone who dissents;<sup>48</sup> or who moves to set aside the sale.<sup>49</sup> He is trustee alike for the corporation, and the bondholders, and is liable for any secret profit he may make in the transaction, at expense of either.<sup>50</sup> But where a mortgage of a railroad, contained a covenant that the trustee named therein should, at a request of a majority of the bondholders, purchase the premises at a sale thereunder, for the benefit of the bondholders, and organize a new company,—it was held to be proper to decree, on a foreclosure of the mortgage, that the trustee should be authorized and directed to bid at the sale, as trustee for first-mortgage bondholders, at least the amount of the principal and interest of the first-mortgage bonds.<sup>51</sup>

**§ 1203. What passes by the sale. Whether franchises and exemptions pass by the sale.**—The purchasers acquire only such property as was covered by the mortgage; and a statute incorporating the purchasers at a foreclosure sale, and vesting in them all the right, title, interest, property, possession, claim, and demand at law or in equity “of the corporation whose property the same was sold as,”—does not vest in the new company any title to a judgment obtained by the old company, not covered by the mortgage under which the property was sold. For, the grant must be interpreted as having relation to what was sold, and not

<sup>47</sup> Zebley v. Farmers', etc. Co., 139 N. Y. 461; James v. Cowing, 82 N. Y. 449; Ricker v. Alsop, 27 Fed. 251; Alsop v. Ricker, 155 U. S. 448.

<sup>48</sup> Zebley v. Farmers', etc. Co., 139 N. Y. 461; Cushman v. Bonfield, 139 Ill. 219; Butterfield v. Cowing, 112 N. Y. 486; James v. Cowing, 82 N. Y. 449.

<sup>49</sup> Sahlgard v. Kennedy, 1 McCrary, 291, 2 Fed. 295.

<sup>50</sup> Ashuelot Ry. v. Elliot, 57 N. H. 397.

<sup>51</sup> Rogers v. Wheeler, 43 N. Y. 598; James v. Cowing, 82 N. Y. 449; Barnes v. Chicago, etc. Co., 88 Bis. 514, Fed. Cas. 1,016; Zebley

v. Farmers', etc. Co., 163 N. Y. 461; Sage v. Central R. Co. (1878), 99 U. S. 334. In foreclosure proceedings permission is usually granted by the court to the bondholders to buy in the property and pay for it with their bonds. Ketchum v. Duncan, 96 U. S. 659; Kropholler v. St. Paul, etc. Co., 1 McCrary, 301, 2 Fed. Rep. 304. And the court may decree that any person other than the mortgage trustee who shall purchase the property at the sale shall make an immediate payment in cash of a part of his bid, by way of earnest. Sage v. Central R. Co., 99 U. S. 334.

to that which was not sold and could not have been legally sold under the decree of foreclosure.<sup>52</sup>

*Exemption from taxation.*—Even where the constitution has not prohibited the grant of special privilege or immunity to corporations, the question, whether an exemption from taxation of a corporation, passes to the purchaser of its property, franchises and privileges,—depends upon the legislative intent, which must be made clear in express terms, and affirmatively appear otherwise than that the purchasing corporation shall have all the “powers, privileges and immunities” of the old corporation.<sup>53</sup>

*Statutory transfer of property rights and franchises.*—When under statute, a corporation is created to succeed to the property and franchises of another, what franchises and powers pass with the property, depends upon the statute, and upon the charter of the old corporation.<sup>54</sup> In succeeding to all the rights of the old corporation, the new corporation is subject to all the burdens of the old.<sup>55</sup> Unless under express authority the purchasers are held not to acquire corporate existence; for a corporation can not, without legislative authority, alienate or mortgage its franchise to be a corporation.<sup>56</sup> But where, in a sale authorized under statute of the corporate property, its value depends upon its franchise, as, to operate a railroad, the purchaser succeeds to the corporate franchises, as well as to the other property,<sup>57</sup> and with power to exercise the right to appropriate land under the power of eminent domain, necessary for the effective operation of the road.<sup>58</sup> The franchise and privileges of a railroad or other common carrier, are strictly construed in favor of the public,<sup>59</sup> and accordingly purchasers at a foreclosure sale do not acquire the franchise of corporate entity,<sup>60</sup> independently of statutory author-

<sup>52</sup> *Wilmington, etc. R. Co. v. Downward* (Del. 1888), 4 Ry. & Corp. L. J. 234, 236.

<sup>53</sup> *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244.

<sup>54</sup> *City of Savannah v. Steamboat, etc. Co.*, R. M. Charl. (Ga.) 342; *State v. Newman*, 51 La. Ann. 833, 72 Am. St. Rep. 476, 25 South. 408.

<sup>55</sup> *Mulloy v. Nashville, etc. Co.*, 8 Lea (Tenn.), 427; *Penn. R. Co. v. Sly*, 65 Pa. St. 209; *Daniels v. St. Louis, etc. Co.*, 62 Mo. 43; *City of Detroit v. Mutual Gas Co.*, 43 Mich. 594.

<sup>56</sup> *Vide supra*, §§ 835, 1166; Snell

v. *City of Chicago*, 133 Ill. 413, 8 L. R. A. 858; *Oregon R. Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 1.

<sup>57</sup> *Lawrence v. Morgan, etc. Co.*, 39 La. Ann. 427, 4 Am. St. Rep. 265, 2 South. 69.

<sup>58</sup> *Morgan v. Louisiana*, 93 U. S. 217.

<sup>59</sup> *Covington, etc. Co. v. Sandford*, 164 U. S. 578; *Phenix, etc. Ins. Co. v. Tennessee*, 161 U. S. 174.

<sup>60</sup> *Metz v. Buffalo, etc. R. Co.*, 58 N. Y. 61; *Wellsborough, etc. Plank R. Co. v. Griffin*, 37 Pa. St. 417; *People v. Cook* (1888), 110 N. Y. 443, where the court said: “The

ity.<sup>61</sup> But the legislature may authorize the transfer of the right to be a corporation, and when under legislative authority, a corporation transfers its property and franchise to be a corporation, this is in effect a surrender of its charter, and a legislative grant of similar charter to the transferee.<sup>62</sup> Other franchises, however, which are capable of alienation and mortgage, do pass under a foreclosure sale, and vest in the purchasers.<sup>63</sup> In the case of *quasi*-public corporations, when such franchises as the right of eminent domain or the right to maintain and operate a railway are transferred by virtue of foreclosure proceedings, the purchasers take them subject to the obligations to the public which their possession imposes. "The public has an interest in the continuous user of the railroad, its franchises and corporate property, in the manner and for the purposes contemplated by the terms of the charter; and upon principle it would seem plain that railroad property, once devoted (and essential) to public use, must remain pledged to that use, so as to carry to full completion the purpose of its creation."<sup>64</sup> The property of a religious corporation, dissolved by reason of the expiration of its charter, vests in its members, who may re-incorporate; and the new corporation may sue for breach of a condition relating to the premises, especially where it has been in possession and has managed the property without objection for many years.<sup>65</sup>

**§ 1204. Redemption. Distribution of proceeds of foreclosure sale.**—At any time prior to the confirmation of the sale under the decree, the mortgagor, by bringing into court the

right to be a corporation, which the old corporation had, was not mortgaged and was not sold, and did not pass to the purchasers, and they only obtain such a right upon filing the certificate mentioned, and then they obtain it by direct grant from the state, and not in any degree by the sale and purchase of the franchises of the old corporation."

<sup>61</sup> In Texas this authority is given by Tex. Rev. Stat., art. 4260. *Of. Acres v. Mayne*, 59 Tex. 625. And it has been conferred in other cases. See 1 Rorer on Railroads, 257, and cases cited *supra*, § 835, POWER TO SELL PROPERTY AND FRANCHISES.

<sup>62</sup> *Delaware, etc. Canal Co. v.*

Commonwealth, 50 Pa. St. 399; *State v. Sherman*, 22 Ohio St. 413.

<sup>63</sup> *People v. O'Brien* (1888), 111 N. Y. 1; *Marshall v. Western North Carolina R. Co.*, 92 N. C. 322.

<sup>64</sup> *Yates v. Boston, etc. R. Co.* (1885), 53 Conn. 333; *St. Louis, etc. Co. v. Terre Haute, etc. R. Co.*, 145 U. S. 393; *Chicago Gas Light, etc. Co. v. People's Gas Light, etc. Co.*, 121 Ill. 530, 2 Am. St. Rep. 124; *Middlesex R. Co. v. Boston, etc. Co.*, 115 Mass. 347; *Richardson v. Sibley*, 11 Allen (93 Mass.), 65, 87 Am. Dec. 700.

<sup>65</sup> *Congregation of the Roman Catholic Church of the Ascension v. Texas & Pacific Ry. Co.* (1890), 41 Fed. Rep. 364, 7 Ry. & Corp. L. J. 477.

amount then due and costs, will be allowed to redeem.<sup>66</sup> Where a trustee enters under a mortgage in default and manages the property, the corporation and stockholders may, on bill to redeem, have an accounting and hold him as a trustee for the corporation as well as of the bondholders.<sup>67</sup> Seven years delay is fatal to redemption by junior mortgagee where the sale is made subject to his rights.<sup>68</sup> The receiver of an insolvent corporation may redeem its property sold in foreclosure, but only upon payment to the purchaser of all that he paid for the property.<sup>69</sup>

*Distribution of proceeds upon foreclosure sale.*—A creditor of the corporation, holding its bonds as security of a claim equal to their face value, is entitled on foreclosure sale to full payment of his claim, though the proceeds of his share of the bonds are insufficient for the purpose.<sup>70</sup>

<sup>66</sup> Chicago, etc. R. Co. v. Fosdick (1882), 106 U. S. 47. "While the parties to this suit were fiercely litigating the amount of the mortgage debt and questions of fraud in the origin of that debt, the appointment, or the discharge, of a receiver for the mortgaged property very properly belonged to the discretion of the court in which the litigation was pending. But when those questions had been passed upon by the circuit court, and by this court also on appeal, and the amount of the debt definitely fixed by this court, the right of the defendant to pay that sum, and have a restoration of his property by discharge of the receiver, is clear, and does not depend on the discretion of the circuit court. It is a right which the party can claim, and if he shows himself entitled to it on the facts in the record, there is no discretion in the court to withhold

it. A refusal is error—judicial error—which this court is bound to correct when the matter, as in this instance, is fairly before it." Milwaukee, etc. R. Co. v. Soutter, 2 Wall. 510, 521. Where, on hearing, a receiver is discharged, and the land in his possession restored to those from whom he received it, the rents which accrued while he held it should be returned to those who would have taken them if he had not interfered, even though they be insolvent. Caswell v. Bunch (1888), 77 Ga. 504.

<sup>67</sup> Ashuelot R. Co. v. Elliott (1874), 57 N. H. 397.

<sup>68</sup> Simmons v. Burlington Ry. (1895), 159 U. S. 278.

<sup>69</sup> Swan v. Stiles (N. Y. Supp. 1904), 87 N. Y. S. 1089.

<sup>70</sup> Georgetown, etc. Co. v. Fidelity, etc. Co. (Ky. 1904), 78 S. W. 113.

## CHAPTER L.

### INSOLVENCY.

§ 1205. What constitutes insolvency of a corporation. 1206. Assignment by corporation for the benefit of creditors. 1207. Authority of directors to make assignment. 1208. Statutory prohibition of assignments. 1209. Assignments by foreign corporations. 1210. Affects of assignment. 1211. Bankruptcy of the corporation. 1212. Assignee in bankruptcy. Insolvency proceedings.	§ 1213. Preferences to creditors. Power to make preference. Trust fund theory. 1214. Preferences to its officers by insolvent corporation. 1215. Preferences to directors and others, by way of mortgage. 1216. Preferences to creditors where directors and other officers are indorsers and sureties. 1217. Preferences to stockholders.
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#### References:

Receivers' and assignees' powers and duties. Section 1218-1245.

Insolvency as ground for dissolution. Section 1317.

Trust fund theory of capital stock. Sections 299-301c.

**§ 1205. What constitutes insolvency of a corporation.**—The corporation may be held to be insolvent where its embarrassments necessitate early suspension and failure; when its liabilities greatly exceed its assets, and it is about to discontinue business, or has ceased to do business.<sup>1</sup> The corporation, when it is a "going concern," is not to be considered insolvent, because of embarrassment and inability to pay its debts, or because its liabilities exceed the value of its assets, or where the corporation is in good faith carrying on its business successfully, and the prospects are that it will continue to do so.<sup>2</sup> Knowledge of insolvency of the corporation is imputable to its managing officers, though they were ignorant of the fact of its insolvency.<sup>3</sup>

<sup>1</sup> *Taylor v. Mitchell*, 80 Minn. 492, 83 N. W. 18.

<sup>2</sup> *Illinois Steel Co. v. O'Donnell*,

156 Ill. 624, 47 Am. St. Rep. 245, 31 L. R. A. 265.

<sup>3</sup> *James Clark & Co. v. Colton*, 91 Md. 195, 49 L. R. A. 698.

**§ 1206. Assignment by corporations for the benefit of creditors.**—It is the common law right of a corporation, as of an individual, upon insolvency, or ceasing business, to make an assignment for the benefit of its creditors.\*

\* Following are decisions, federal and state, upon authority to make assignments:

*Federal courts:* United States v. Rubber Co. (1901), 181 U. S. 434; Coler v. Allen (1902), 114 Fed. 609.

*Alabama:* Norton v. Alabama Bank (1894), 102 Ala. 420, 14 South. 872; O'Bear Jewlery Co. v. Volfer (1895), 106 Ala. 205, 28 L. R. A. 707, 54 Am. St. Rep. 31.

*Arkansas:* Worthen v. Griffith, 59 Ark. 562, 43 Am. St. Rep. 50, 28 S. W. 286.

*Colorado:* John V. Farwell Co. v. Sweetzer, 10 Colo. App. 421, 51 Pac. 1012.

*Connecticut:* Smith v. Skeary (1879), 47 Conn. 47.

*Georgia:* McCallie v. Walton (1868), 37 Ga. 611, 95 Am. Dec. 369.

*Illinois:* State Nat. Bank v. Union Bank (1897), 168 Ill. 519, 48 N. E. 82; Thompson Co. v. Whitehead, 185 Ill. 454, 76 Am. St. Rep. 51.

*Indiana:* Smith v. Wells, etc. Co. (1897), 148 Ind. 333, 46 N. E. 1000.

*Iowa:* First Nat. Bank v. Garretson (1899), 107 Iowa, 196, 77 N. W. 858.

*Kansas:* Grand, etc. Co. v. Rude, etc. Co. (1899), 60 Kan. 145, 55 Pac. 848.

*Kentucky:* Louisville, etc. Co. v. Etheridge, etc. Co. (Ky. 1897), 43 S. W. 169.

*Maryland:* Miller v. Matthews, 87 Md. 464, 40 Atl. 176.

*Massachusetts:* Sargent v. Webster (1847), 54 Mass. 497, 46 Am. Dec. 143.

*Michigan:* Boynton v. Roe (1897), 114 Mich. 401, 72 N. W. 257.

*Minnesota:* Tripp v. Northwest-

ern, etc. Bank (1891), 45 Minn. 383, 48 N. W. 4.

*Mississippi:* Fargason v. Oxford, etc. Co. (1900), 78 Miss. 65, 27 South. 877.

*Missouri:* Slavens v. Cook Drug Co. (1895), 128 Mo. 341, 30 S. W. 1025.

*Montana:* Ames, etc. Co. v. Hestlett (1897), 19 Mont. 188, 47 Pac. 805, 61 Am. St. Rep. 496.

*Nebraska:* Shaw v. Robinson, etc. Co. (1897), 50 Neb. 403, 60 N. W. 947.

*New Hampshire:* Flint v. Clinton Co., 12 N. H. 430.

*New Jersey:* Wilkinson v. Bauerle, 41 N. J. Eq. 635, 7 Atl. 514.

*New York:* From 1892 assignments by insolvent domestic corporations, as well as foreign, have been allowed if no preference to creditors is given. Stock Corp. Law, § 48; Croll v. Empire Co. (1897), 17 N. Y. App. Div. 282; Vanderpoel v. Gorman (1894), 140 N. Y. 563, 35 N. E. 932, 24 L. R. A. 548, 37 Am. St. Rep. 601; Lane v. Wheelwright (1893), 69 Hun, 180; Bank v. Garfield, etc. (1900), 56 N. Y. App. Div. 43.

*Ohio:* Stetson v. City Bank of New Orleans, 12 Ohio St. 577.

*Pennsylvania:* Moller v. Keystone, etc. Co. (1898), 187 Pa. St. 553, 41 Atl. 478.

*South Carolina:* Parker v. Carolina Sav. Bank (1899), 53 S. C. 583.

*South Dakota:* Wright v. Lee, 2 S. D. 596 (1892), 51 N. W. 708.

*Tennessee:* Buchanan v. Barnes (Tenn. 1896), 34 S. W. Rep. 425.

*Texas:* Birmingham, etc. Co. v. Freeman (1897), 15 Tex. Civ. App. 451, 39 S. W. 626.

*Utah:* Only a bank may make

**§ 1207. Authority of directors to make assignment.**—The directors have the power to execute, or authorize the execution of, an assignment of all the property of the corporation for the benefit of its creditors, whenever they deem it necessary or advisable to do so.<sup>5</sup> They exercise the power independent of assent by the stockholders. Neither the president, or the vice president, or any other corporate officer,<sup>6</sup> as general manager, has any such implied authority.<sup>7</sup>

**§ 1208. Statutory prohibition of assignments.**—Owing to the abuses of the right of corporations to make assignments and prefer creditors, the States generally are adopting statutes prohibiting assignment for the benefit of creditors, and although the assignment may be without any preference of creditor. In some States, the statutes expressly prohibit assignment by a corporation, insolvent or contemplating insolvency, although the assignment be made without preference to any creditor. In New Jersey,<sup>8</sup> and in New York, the prohibition applies only to banks, insurance companies and railroads.<sup>9</sup> Statutory provisions in some States, prohibit corporations, insolvent or contemplating insolvency, from giving preference to creditors; but frequent changes make it necessary, in any case, to examine the statute which was in force at the time of decision.

**§ 1209. Assignment by foreign corporations.**—The insolvency laws of a State have no extra territorial operation. By the weight of authority, a foreign insolvent corporation, if allowed by the laws of its domicile, or by its charter, to make assignment and prefer creditors, may make such assignment and prefer creditors in a State wherein it is permitted to do business, although

assignment. *Cupit v. Park City Bank* (Utah, 1899), 58 Pac. 839.

*Vermont:* *Warner v. Mower*, 11 Vt. 385 (1839).

*Virginia:* *Lewis v. Glenn*, 84 Va. 947 (1888), 6 S. E. 866.

*Washington:* *Nyman v. Berry*, 3 Wash. St. 734 (1892), 29 Pac. 557.

*West Virginia:* *Young v. Improvement, etc. Assn.* (1900), 38 S. E. 670, 48 W. Va. 512.

*Wisconsin:* *Garden City, etc. Co. v. Geilfuss* (1893), 86 Wis. 612, 57 N. W. 349; *Binder v. McDonald*, 106 Wis. 332, 82 N. W. 156.

*Canada:* *Whitney v. Hovey*, 13 Ont. App. 7.

<sup>5</sup> *Calument Paper Co. v. Haskell, etc. Co.*, 144 Mo. 331, 66 Am. St. Rep. 425.

<sup>6</sup> *Chamberlain v. Bromberg*, 83 Ala. 576 (1888), 3 So. 434.

<sup>7</sup> *Norton v. Alabama Nat. Bank*, 102 Ala. 420, 14 So. 872; *Hadden v. Dooley*, 35 C. C. A. 554, 93 Fed. 728; *Huse v. Ames*, 104 Mo. 91, 15 S. W. 965.

<sup>8</sup> *American, etc. Co. v. Pater-son, etc. Co.*, 22 N. J. Eq. 72.

<sup>9</sup> *Troy Waste, etc. Co. v. Harri-son*, 73 Hun (N. Y.), 528.

such assignment and preference be contrary to the statutes of the State.<sup>10</sup>

**§ 1210. Effects of assignment.**—If the corporation is insolvent, it can not purchase its own stock.<sup>11</sup> Where a corporation makes an assignment for the benefit of creditors, it commits an act of bankruptcy.<sup>12</sup> A corporation is not dissolved by reason of its making assignment for the benefit of creditors.<sup>13</sup> The officers do not lose their salaries, between the time of assignment and of reconveyance to the corporation, if in the interval they perform their accustomed duties.<sup>14</sup> Such assignment and insolvency are not grounds for proceedings to forfeit its charter, if the assignment does not disable the corporation from performing the charter conditions.<sup>15</sup> No “call” on stockholder for payment of unpaid subscription, is necessary in case of insolvency. A court of equity, in its discretion, will not regard the formality of “call,” but may order payment, for benefit of the creditors, to be made to the receiver.<sup>16</sup> Insolvency, as a rule, is a bar to the right of a subscriber to rescind his contract, because of fraud in its procurement. After insolvency and the appointment of a receiver, it is too late to rescind.<sup>17</sup>

**§ 1211. Bankruptcy of the corporation.**—Though the bankruptcy courts have jurisdiction over an insolvent corporation, being wound up in a State court, yet the bankruptcy court may refuse to assume jurisdiction, if it appear that the State proceeding will most benefit the creditors.<sup>18</sup> The bankruptcy act does not apply to *quasi-public* corporations.<sup>19</sup>

**§ 1212. Assignee in bankruptcy. Insolvency proceedings.** The assignee, appointed in bankruptcy or involvency proceedings, is the representative of the creditors as well as of the corpora-

<sup>10</sup> *East Side Bank v. Columbus, etc. Co.*, 170 Pa. St. 1; *Vanderpoel v. Gorman*, 140 N. Y. 563, 37 Am. St. Rep. 601.

<sup>11</sup> *Augsburg, etc. Co. v. Pepper* (1897), 95 Va. 92, 27 S. E. 807; *Hamor v. Taylor, etc. Co.* (1897), 84 Fed. 392.

<sup>12</sup> *Clark v. American, etc. Co.* (1900), 101 Fed. 962.

<sup>13</sup> *Vide infra*, § 1317, DISSOLUTION; *United States v. Little Maimi, etc. Co.*, 1 Fed. 700; *Sleeper v. Goodwin*, 67 Wis. 577, 31 N. W. 335.

<sup>14</sup> *Potts v. Rose Valley Mills, 167 Pa. St. 310.*

<sup>15</sup> *State v. Bailey*, 16 Ind. 46, 79 Am. Dec. 405.

<sup>16</sup> *In re Minnehaha, etc. Assn.* (1893), 53 Minn. 423.

<sup>17</sup> *Olsen v. State Bank* (1897), 67 Minn. 267; *Lantry v. Wallace* (1899), 97 Fed. 865; *Roach v. Burgess* (Tex. 1901), 62 S. W. 803.

<sup>18</sup> *In re Harper & Bros.* (1900), 100 Fed. 266.

<sup>19</sup> *In re New York, etc. Co.*, 98 Fed. 711 (1900).

tion. He alone can enforce the liability of stockholders for unpaid subscriptions. Creditors can not sue after his appointment.<sup>20</sup> Estoppel upon the director or officer as creditor to hold the other officers liable who are equally guilty with him, of acts or omissions,—extends also to his assignee.<sup>21</sup> “Neither a receiver, nor an assignee in bankruptcy, nor an assignee under a voluntary general assignment for the benefit of creditors, each of whom represents creditors as well as the insolvent, acquires any right to enforce collateral obligations given to a creditor, or to a body of creditors, by a third person, for the payment of the debts of the insolvent.”<sup>22</sup> A *bona fide* unregistered transfer of stock will prevail as against a subsequent assignment by the transferrer for the benefit of creditors, as also against an assignee in bankruptcy, or insolvency proceedings.<sup>23</sup>

**§ 1213. Preferences to creditors. Power to make preference. Trust fund theory.**—*The trust fund theory* was that the assets of a corporation, insolvent or contemplating insolvency, are a trust fund for the benefit of all creditors of the corporation, so that it can not, like a natural person, make a preference among its creditors, by assignment or otherwise, which a court of equity would not set aside; but that theory, except in case of insolvency, no longer prevails. When proceedings in case of insolvency have been instituted to wind up the business of a corporation, it can not withdraw or distribute its assets, by assignment or otherwise, to the prejudice of any of its creditors, they all, in such case, being entitled to distribution of the assets *pro rata*, just as in the case of any individual insolvent.<sup>24</sup>

<sup>20</sup> Lane v. Nickerson, 99 Ill. 284; Union Nat. Bank v. Hill, 148 Mo. 380, 71 Am. St. Rep. 615.

<sup>21</sup> Knox v. Baldwin, 80 N. Y. 610.

<sup>22</sup> Jacobson v. Allen, 20 Blatchf. 525, 12 Fed. 454.

<sup>23</sup> Sibley v. Quinsigamond Nat. Bank, 133 Mass. 515.

<sup>24</sup> *Vide*, §§ 299-301c, TRUST FUND THEORY. The following are leading decisions upon giving preference to creditors:

*Federal Courts:* Sanford, etc. Co. v. Howe, etc. Co., 157 U. S. 312; Hollins v. Brierfield, etc. Co., 150 U. S. 371; *In re Bates*, etc. Co. (1899), 91 Fed. 625.

*Alabama:* Anderson v. Bullock Co. Bank, 122 Ala. 275, 25 So. 523.

*Arkansas:* Ringo v. Bisco, 12 Ark. 563 (1853). Preferences are by statute prohibited to creditors of insolvent corporations. Sand & H. Dig. 1425.

*California:* Merced Bank v. Ivett (1899), 127 Cal. 134, 59 Pac. 393.

*Colorado:* Though insolvent, a corporation may prefer creditors and convey all its property to anyone of them. John V. Farwell Co. v. Sweetzer (1897), 10 Colo. App. 421, 51 Pac. 1012.

*Connecticut:* Smith v. Skeary, 47 Conn. 47 (1879).

*Power to make preference.*—A corporation, to whatever degree it may be insolvent, holds its assets as an individual holds his property, with the same common-law right to dispose of it, and to incur debts, and to secure its creditors. In making an assignment for the benefit of its creditors, it may prefer one or more of them, to the exclusion of others, or prefer one class of creditors over others.<sup>26</sup> In the distribution of the assets of an insolvent corporation, a State may prefer its own citizens as against the *corporation* of other States but not as against the *citizens* of other States.<sup>28</sup> When, in making a general assignment for the benefit of creditors, a corporation is not permitted to give preferences to particular creditors, any security given, pending the making of the assignment, will be held void.<sup>27</sup> Where statutes expressly pro-

*Georgia:* Milledgeville, etc. Co. v. McIntrye, etc., 98 Ga. 503, 25 S. E. 567.

*Illinois:* Though insolvent a corporation may prefer creditors. State Nat. Bank v. Union, etc. Bank (1897), 168 Ill. 519, 48 N. E. 82; Rockford, etc. v. Standard, etc. Co., 175 Ill. 89, 67 Am. St. Rep. 205.

*Indiana:* Smith v. Wells, etc. Co. (1897), 148 Ind. 333, 46 N. E. 100.

*Iowa:* Though insolvent a corporation may prefer creditors. First Nat. Bank v. Garretson, 107 Iowa, 196 (1899), 77 N. W. 856.

*Kansas:* Grand, etc. Co. v. Rude, etc. Co. (1899), 60 Kan. 145, 55 Pac. 848.

*Kentucky:* Lexington, etc. Co. v. Page, 17 B. & Mon. 412, 66 Am. Dec. 165.

*Maine:* Symonds v. Lewis, 94 Me. 501, 48 Atl. 121.

*Maryland:* State v. Bank of Maryland, 6 Gill & J. 205, 26 Am. Dec. 561.

*Michigan:* Austin v. First Nat., etc. Bank (1894), 100 Mich. 613, 59 N. W. 597. Except insolvent banks.

*Mississippi:* Though insolvent a corporation may prefer creditors. Fargason v. Oxford, etc. Co., 78 Miss. 65 (1900), 27 So. 877.

*Missouri:* Pullis v. Pullis, etc. Co., 157 Mo. 565, 57 S. W. 1095.

*Montana:* Ames, etc. Co. v. Hezlett (1897), 19 Mont. 188, 47 Pac. 805, 61 Am. St. Rep. 496.

*Nebraska:* M. A. Seeds, etc. Co. v. Heyn, etc. Co. (1898), 57 Neb. 214, 77 N. W. 660.

*New Jersey:* Savage v. Miller, 56 N. J. Eq. 432, 39 Atl. 665.

*North Carolina:* Merchants' National Bank v. Newton, etc. Mills (1894), 115 N. C. 507, 20 S. E. 765.

*Oregon:* Currie v. Bowman, 25 Oreg. 364 (1894), 35 Pac. 848.

*Pennsylvania:* Moller v. Keystone, etc. Co. (1898), 187 Pa. St. 553, 41 Atl. 478.

*Utah:* National Bank, etc. v. Geo. M. Scott & Co., 18 Utah, 400, 55 Pac. 385.

*Vermont:* Whitwell v. Warner, 20 Vt. 425.

*Virginia:* Planters' Bank v. Whittle (1884), 78 Va. 737.

*Wisconsin:* Slack v. North Western Bank, etc., 103 Wis. 57, 74 Am. St. Rep. 841.

*Wyoming:* Conway v. Smith, etc. Co. (1896), 6 Wyo. 468, 46 Pac. 1084.

<sup>26</sup> Allis v. Jones, 45 Fed. 148; Atlanta, etc. R. R. v. Western Ry., 50 Fed. 790.

<sup>28</sup> Blake v. McClung (1898), 172 U. S. 239.

<sup>27</sup> Wyeth, etc. Co. v. Standard, etc. Co., 47 Kan. 423.

vide that assignment for benefit of creditors shall be for the benefit of all the creditors, *pro rata*, the corporation can not give any preference.<sup>28</sup> The mere fact that creditors are also directors of the corporation, does not preclude them from being preferred.<sup>29</sup> A corporation, even with consent of all its shareholders, cannot pledge its credit to the prejudice of its creditors, for the price of goods sold to another corporation.<sup>30</sup> A contract between a corporation and a majority of its directors to advance money for payment of corporate debts, due to them in part, whereby they are given a preference, though not void, may be set aside at the instance of the corporate creditors or stockholders, unless in case of entire good faith and fairness, and ignorance by the directors of existing or imminent insolvency.<sup>31</sup>

**§ 1214. Preference to its officers by an insolvent corporation.**—By reason of their fiduciary relations to the corporation, directors and other managing officers, when the corporation becomes insolvent, can not be preferred as creditors; they can no more than share *pro rata* with the other creditors.<sup>32</sup> Even though such preferences be not expressly prohibited, as they are in some States, they may be set aside in equity by other creditors, upon showing actual fraud or unfairness.<sup>33</sup> But the preference will be sustained where the circumstances make it just and right that the officer should be paid before other creditors, as in cases of advances made to pay debts or current expenses of the corporation.<sup>34</sup> Where a director of an insolvent corporation resigned immediately before a preference was given to him as a creditor, the preference was set aside as invalid against other creditors.<sup>35</sup> Directors who are at the same time creditors of the corporation, who have allowed it to exceed its prescribed limit of debt, will be postponed to other creditors who were ignorant of the financial condition of the corporation at the time they lent their credit to

<sup>28</sup> *Larrabee v. Franklin Bank*, 114 Mo. 592.

<sup>29</sup> *Campau v. Detroit, etc. Club*, 98 N. W. 267, 90 N. W. 49 (Mich. 1904), 10 Det. Leg. News, 870.

<sup>30</sup> *In re Prospect, etc. Mills*, 126 Fed. 1011 (U. S. D. C., Mass. 1904).

<sup>31</sup> *Wyman v. Bowman* (Iowa, 1904), 127 Fed. 257 (U. S., C. A.).

<sup>32</sup> *Beach v. Miller*, 130 Ill. 162, 17 Am. St. Rep. 291.

<sup>33</sup> *James Clark Co. v. Colten*, 91 Md. 195, 49 Atl. 386, 49 L. R. A. 698; *Rickerson, etc. Co. v. Farrell, etc. Co.*, 23 C. C. A. 302, 75 Fed. 554.

<sup>34</sup> *Hill v. Standard, etc. Co.*, 198 Pa. St. 446, 48 Atl. 432; *Appeal of Neal*, 129 Pa. St. 64, 18 Atl. 564; *Mueller v. Monongahela, etc. Co.*, 183 Pa. St. 450, 38 Atl. 1009.

<sup>35</sup> *Mallory v. Kirkpatrick*, 54 N. J. Eq. 50, 33 Atl. 205.

it.<sup>36</sup> In New York, the statute prohibits preference to officers. "No corporation, which shall have refused to pay any of its notes or other obligations when due, in lawful money of the United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors, or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash," etc.<sup>37</sup> A preference to a partnership of which a stockholder is a member is illegal.<sup>38</sup> Preference to a director is illegal, although agreed to at the time of the loan.<sup>39</sup> A sale of property by an insolvent corporation to a director by way of making him a preferred creditor, is illegal.<sup>40</sup> A preference by an insolvent corporation to its treasurer is illegal.<sup>41</sup> A preference to a corporation president is illegal.<sup>42</sup> A part payment of a debt to directors by transfer of property by an insolvent corporation is illegal.<sup>43</sup> A mortgage by a corporation to the wife of a corporate officer as security for debt due her husband is illegal.<sup>44</sup> At common law a corporation may give a preference to a director.<sup>45</sup>

**§ 1215. Preference to directors and others by way of mortgage.**—Though a mortgage may be made, if in good faith, to a director by a solvent corporation, if the corporation is insolvent, or in contemplation of insolvency, it can not mortgage its property to a director, or make him a preferred creditor, or secure its debt to him by any transfer of its property, or by paying him in cash.<sup>46</sup> But a solvent corporation may secure by mortgage, a debt due to a director. He may take a mortgage from the corporation for money loaned to it at the time, and may buy in the property at foreclosure sale.<sup>47</sup>

*Preference by way of mortage to other creditors.*—A corporate creditor may take a mortgage on the corporate property though he

<sup>36</sup> Guenther v. Baskett Coal Co. (Ky.), 52 S. W. 931.

<sup>44</sup> Rome v. Lenchold (1898), 101 Wis. 242.

<sup>37</sup> Laws N. Y. C. 354, § 48.

<sup>45</sup> Wilson v. Stevens (1901), 129 Ala. 630 (1901), 29 So. 678, 87 Am. St. Rep. 86.

<sup>38</sup> Jones v. Blun (1895), 145 N. Y. 333, 39 N. E. 954.

<sup>46</sup> Simonds v. Lewis (1901), 94 Me. 501; Nappanee, etc. Co. v. Reid, etc. Co. (Ind. 1901), 60 N. E. 1068; *In re Estate*, etc., 52 Atl. 58 (Pa. 1902); Neal's Appeal (1889), 129 Pa. St. 64; King v. Van Dusen (1897), 95 Wis. 503.

<sup>39</sup> Monroe, etc. Co. v. Arnold, 108 Ga. 449 (1899), 34 S. E. 176.

<sup>47</sup> Preston v. Loughran (1890), 58 Hun, 210; Skinner v. New York (1892), 134 N. Y. 240.

<sup>40</sup> Mallory v. Kirkpatrick, 54 N. J. Eq. 50 (1895), 33 Atl. 205.

<sup>41</sup> Beach v. Miller (1889), 130 Ill. 162, 17 Am. St. Rep. 291.

<sup>42</sup> King v. Wooldridge (1900), 78 Miss. 179, 28 So. 824.

<sup>43</sup> Hill v. Standard, etc. Co., 198 Pa. St. 546 (1901), 48 Atl. 32.

knows that the corporation is insolvent.<sup>48</sup> Where a creditor of an insolvent corporation is also its debtor for less sum, the corporation may prefer him over other creditors, but only for the balance due him.<sup>49</sup> If a creditor has already in good faith obtained for his debt collateral security, he can not be required to give up the security for division among all the creditors, but, until such security is exhausted he can not share in the other corporate assets.<sup>50</sup>

**§ 1216. Preference to creditors where directors and other officers are indorsers, guarantors and sureties.**—The preponderance of authority, among the conflicting decisions, is that a preference is illegal which is given by an insolvent corporation to creditors holding notes or other obligations of the corporation, which its directors have indorsed or guaranteed or for which they have become surety.<sup>51</sup> Where an insolvent corporation has given a preference to a debt guaranteed by its directors, it is a rule in New Jersey, that the other creditors may recover from the directors the difference between what is realized from the preference, and what would have been realized had there been no preference.<sup>52</sup> Although a director was guarantor of a corporate debt incurred before insolvency of the corporation, a preference may be given.<sup>53</sup> A mortgage by a corporation, at the time considered to be solvent, to secure a debt guaranteed by a director, of a debt upon which he is a surety, is illegal, and can not be paid out of the funds of an insolvent corporation.<sup>54</sup> Transfer of property by the president of a corporation to his wife, as security for their indorsement of corporate notes, is illegal.<sup>55</sup>

**§ 1217. Preference to stockholders.**—The remedy of corporate creditors against an illegal preference, is by a creditor's bill, and not by an execution sale.<sup>56</sup> Unlike officers, creditors of

<sup>48</sup> Doe v. Northwestern, etc. Co., 78 Fed. 62.

etc. (1900), 111 Ga. 703, 36 N. E. 939.

<sup>49</sup> Corey v. Wadsworth, 118 Ala. 488, 25 So. 503, 44 L. R. A. 766.

<sup>52</sup> Savage v. Miller (1898), 56 N. J. Eq. 432, 39 Atl. 665.

<sup>50</sup> Welch v. Sargent, 127 Cal. 72, 59 Pac. 319.

<sup>53</sup> Rockford, etc. Co. v. Standard, etc. Co. (1898), 175 Ill. 89, 67 Am. St. Rep. 205.

<sup>51</sup> Williams v. Turner (Neb. 1902), 88 N. W. Rep. 668; Bos-

<sup>54</sup> Sabin v. Columbia Fuel Co. (1893), 25 Oreg. 15; Graham v. Carr (N. C. 1902), 41 S. E. 379.

worth v. Jacksonville Nat. Bank (1894), 64 Fed. 615; Consolidated,

<sup>55</sup> Hill v. Marston (1901), 178 Mass. 285, 59 N. E. 766.

etc. Co. v. Kansas City, etc. Co. (1890), 43 Fed. 204; Swift & Co.

<sup>56</sup> Butler v. Harrison, etc. Co. (1897), 139 Mo. 467, 61 Am. St. Rep. 464.

v. Dyer, Veatch Co. (1901), 28 Ind. App. 1, 62 N. E. 70; Hill v.

Marston (1901), 178 Mass. 285; Atlas, etc. Co. v. Exchange Bank,

the stockholders, as corporate creditors, sustain no fiduciary relations toward the corporation; and when having no charge or control of its assets, they may be preferred over other creditors of insolvent corporations, where the transaction is *bona fide*, free from fraud, and perfectly fair.<sup>57</sup> But the rule as to directors, applies to preferences to a stockholder, when he is also a director, or obtains the preference by reason of his being a majority stockholder.<sup>58</sup> Preferred stockholders are not creditors, and upon distribution of the assets of a corporation are entitled to nothing, until its creditors are first fully paid.<sup>59</sup>

<sup>57</sup> *Bouton v. Smith*, 113 Ill. 481; *Rollins v. Shaver, etc. Co.*, 80 Iowa, 380, 20 Am. St. Rep. 427.

<sup>58</sup> *Atwater v. American Exchange Nat. Bank*, 152 Ill. 605, 38

N. E. 1017; *Roan v. Winn*, 93 Mo. 503, 4 S. W. 736.

<sup>59</sup> *Heller v. National, etc. Bank*, 89 Md. 602, 43 Atl. 800, 73 Am. St. Rep. 212, 45 L. R. A. 438.

## CHAPTER LI.

### RECEIVERS.

§ 1218. Nature and grounds of receivership. Insolvency as a ground.	Execution or attachment.
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1220. (a) Who may apply for; the state; bondholders; stockholders; the corporation as a mortgagor.	1233. Operating expenses, priority in payment.
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1222. (c) Whether creditors unsecured may have appointment.	1235. Transfer of the corporate property to receivers. Vesting of the title. Possession of property by the receivers.
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1229. Removal of causes to federal courts.	1242. Compensation of receivers.
1230. Suits by a receiver.	1243. Counsel fees in receiverships.
1231. Suits against receiver.	1244. Compensation of mortgage trustees in foreclosure.
	1245. Resignation, removal and discharge of receivers. Embezzlement.

#### *References:*

Insolvency. Sections 1205-1217.

Receivers in foreclosure proceedings. Sections 1104-1204.

Trustee of mortgage as receiver. Section 1195.

Suits by receiver of foreign corporation. Section 1344-1360.

Receiver, or assignee, as party to civil actions by or against the corporation. Section 989.

**§ 1218. Nature and grounds of receivership. Insolvency as a ground.**—During the last decade a large majority of the important lines of railway in this country have passed through the hands of receivers, and the questions adjudicated in the courts have accordingly been a multitude, regarding the powers and duties of the courts, and the duties and liabilities of receivers, and of parties to the suits. The appointment of a receiver “is not a matter of right, but rests in the sound discretion of the court, and the power is to be exercised sparingly and with great caution.”<sup>1</sup> A receiver may be appointed in case of inability or refusal to pay interest, in the absence of security given, and where there is danger of ultimate loss to the mortgagee.<sup>2</sup> The mere fact of insolvency of a corporation, without proof of fraud, mismanagement, or waste of the corporate assets, will not authorize the appointment of a receiver.<sup>3</sup> That the secretary and treasurer conceal the books and records will not sustain the application of the president, who is also a stockholder, for an injunction and receivership, no fraud or mismanagement being charged by any other officer, and no request being made upon the directors to bring suit for relief.<sup>4</sup> Where a coupon holder obtained judgment by consent and execution, which by terms of the mortgage made the bonds due, the mortgage will be declared due, though that was the purpose of the consent judgment.<sup>5</sup> In case of a railroad whose road is leased for rental insufficient to pay interest on its bonds, a receiver will not be appointed simply to collect the rental and pay it on the bonds, nor will a receiver be appointed for the lessee, where its earnings are insufficient to pay the rental, and are its only assets.<sup>6</sup> A court of equity, independent of statute, may appoint a receiver where the bill alleges insolvency produced by gross mismanagement and breach of trust of directors.<sup>7</sup> The creditor of an insolvent cor-

<sup>1</sup> Kansas City, etc. R. R. Co. v. Farmers,’ etc. Co. (1892), 53 Fed. 182.

<sup>2</sup> Farmers,’ etc. Co. v. Winona, etc. Ry. Co. (1893), 59 Fed. 957; Central Trust Co. v. Chattanooga, etc. R. R. (1899), 94 Fed. 275; Fort Wayne, etc. Corp. v. Franklin, etc. Co. (1898), 57 N. J. Eq. 7.

<sup>3</sup> Lawrence, etc. Co. v. Rockbridge, etc. Co. (1891), 47 Fed. 755; Trust, etc. Co. v. Spartanburg, etc. Co., 91 Fed. Rep. 324 (1898).

<sup>4</sup> Tompkins Co. v. Catawba

Mills (1897), 82 Fed. 780; Chicago, etc. Ry. Co. v. Kenney (Ind. 1901), 62 N. E. 26; Citizens,’ etc. Co. v. Union, etc. Co. (1900), 106 Fed. 97; Falmouth, etc. Bank v. Cape, etc. Co. (1896), 166 Mass. 550, 44 N. E. 617.

<sup>5</sup> Dickerman v. Northern T. Co. (1900), 176 U. S. 181.

<sup>6</sup> City of Cape May v. Cape May, etc. R. R. Co. (N. J. 1899), 44 Atl. 973.

<sup>7</sup> United States Shipbuilding Co. v. Conklin (1903), 126 Fed. 132.

poration is entitled to appointment of a receiver without first getting judgment and return of *nulla bona*, where the assets will probably be lost or fraudulently disposed of, and the creditor has no adequate remedy at law.<sup>8</sup> For non-payment of taxes, foreclosure proceedings may be brought, and a receiver appointed, where insolvency is charged.<sup>9</sup> Complainants, though not judgment creditors, may maintain a bill for appointment of receiver to take possession and distribute the assets of an insolvent corporation. Requiring them first to exhaust their legal remedy would not only fail to secure the relief prayed for, but would deprive the creditors of such relief.<sup>10</sup> An insolvent corporation, the same as an individual, may prefer creditors. Other creditors cannot attack the president and general manager, on the ground of want of power to prefer creditors; only the directors and stockholders can do so.<sup>11</sup> A receiver will not be appointed where the interest, though years in arrears, is likely soon to be paid, where a majority of the bondholders oppose a receivership, and there is no proof of insolvency, fraud or mismanagement.<sup>12</sup> Bankruptcy proceedings take precedence of an assignment and appointment of receiver of an insolvent corporation.<sup>13</sup> The appointment of a receiver for an insolvent corporation is not prevented by the national bankruptcy act.<sup>14</sup>

**§ 1219. Appointment of receiver. Dissolution as a ground.** A consequence of the dissolution of a corporation being that it can no longer act as such, either before the courts or in business transactions,<sup>15</sup> and that it can neither sue or be sued,<sup>16</sup> the winding up of its affairs must necessarily be conducted by some one

<sup>8</sup> Gamewell, etc. Co. v. Fire, etc. Co. (Ky. 1903), 76 S. W. 862, Ky. Law Rep. 1010; Kentucky, etc. Assn. v. Galbraith (Ky. 1903), 77 S. W. 371.

<sup>9</sup> Putnam v. Jacksonville, etc. Ry. Co. (1893), 61 Fed. 440; American, etc. Bank v. Northwestern, etc. Co. (1898), 89 Fed. 610.

<sup>10</sup> Commonwealth v. Order of Vesta (1893), 156 Pa. St. 531, 27 Atl. 14; *In re Fraternal Guardian* (1894), 159 Pa. St. 603, 28 Atl. 479; Vila v. Grand Island, etc. Co. (Neb. 1903), 94 N. W. 136; State v. Superior Court, 15 Wash. 668 (1896), 47 Pac. 31, 37 L. R. A.

111, 55 Am. St. Rep. 907; *In re Brant* (1899), 96 Fed. 257; Murray v. American Surety Co., 59 Fed. 345 (1894).

<sup>11</sup> Beaman v. Stewart (Colo. 1903), 74 Pac. 344.

<sup>12</sup> Romare v. Broken, etc. Co. (1902), 114 Fed. 194.

<sup>13</sup> Lea v. G. M. West Co. (1899), 91 Fed. 237.

<sup>14</sup> State v. Superior Court, etc. (1899), 20 Wash. 545, 37 L. R. A. 111, 47 Pac. 31.

<sup>15</sup> Saltmarsh v. Planters' etc. Bank, 17 Ala. 761.

<sup>16</sup> City Ins. Co. v. Commercial Bank, 68 Ill. 348; Cooper v. Oriental, etc. Assn., 100 Pa. St. 402.

appointed by the court for that purpose, as, trustee, assignee, receiver, or other officer. Statutory provision is generally made for such appointment of receiver to take charge after dissolution,<sup>17</sup> unless, before proceedings begun in *quo warranto* for dissolution, the corporation had made an assignment to an assignee, who has already entered upon his duties under judicial direction.<sup>18</sup> And sometimes the statutes provide for appointment of a receiver, pending proceedings for dissolution of the corporation.<sup>19</sup>

**§ 1220. (a) Who may apply for. The State, bondholders, stockholders. The corporation as mortgagor.—The State.**—A receiver can not be appointed at the instance of the State, upon *quo warranto* proceedings or otherwise. The appointment is for a court of equity alone to make, and only in a pending suit.<sup>20</sup>

**Bondholders.**—Although a suit is pending by a stockholder for appointment of a receiver, the bondholders on default may bring suit in foreclosure and have a receiver appointed.<sup>21</sup> A receiver may be appointed at the instance of a minority of the bondholders, where the trustee has resigned, the corporation is without officers, or forfeiture of the charter is impending, and executions are being levied.<sup>22</sup> Against objection of the bondholders who are secured upon the remainder of the property, a divisional mortgage bondholder cannot have a receiver appointed over all the corporate property.<sup>23</sup> Generally a stockholder can not have a receiver appointed.<sup>24</sup>

**Stockholders.**—A receiver will not be appointed at the suit of stockholders, when the sole purpose to be subserved is the bringing of suits on behalf of the corporation. The stockholders themselves may bring the actions.<sup>25</sup> A receiver for an insolvent corporation may be appointed at the instance of a stockholder in order to protect its assets, the corporation appearing and consenting, or

<sup>17</sup> St. Louis, etc. Co. v. Sandoval, etc. Co., 111 Ill. 32; Hale-Berry v. Diamond, etc. Co., 94 Ga. 61; People v. Northern R. Co., 53 Barb. (N. Y.) 98.

<sup>18</sup> Commonwealth v. Order of Vesta, 156 Pa. St. 531, 27 Atl. 14.

<sup>19</sup> St. Louis, etc. Co. v. Sandoval, etc. Co., 111 Ill. 32.

<sup>20</sup> Jones v. Mutual, etc. Co., 123 Fed. 126 (1903).

<sup>21</sup> Pennsylvania Co. v. Jacksonville, etc. Co. (1893), 55 Fed. 134.

<sup>22</sup> Ralph v. Shiawassie, etc., 100 Mich. 164 (1894), 58 N. W. 837.

<sup>23</sup> Merriam v. St. Louis, etc. Ry. Co. (1896), 136 Mo. 145, 36 S. W. 630.

<sup>24</sup> Bell v. Wood (1897), 181 Pa. St. 175, 37 Atl. 201; Steele, etc. Co. v. Laurens, etc. Co. (Ga. 1896), 24 S. E. 755; Becker v. Hoke, 80 Fed. 973 (1897); Little Warrior v. Hooper (1895), 105 Ala. 665, 17 So. 118; Darragh v. Wetter Mfg. Co. (1897), 78 Fed. 7; Fowler v. Jarvis, etc. Co. (1894), 64 Fed. 279.

<sup>25</sup> Hallenberg v. Cobre, etc. Co. (Ariz. 1904), 74 Pac. 1052.

when the corporation has been dissolved,<sup>26</sup> but not simply because the liabilities exceed the assets, and the company has ceased to do business.<sup>27</sup> The mortgagor corporation may obtain the appointment of a receiver for its own property, in case of insolvency and risk of loss to the creditors of its assets by its continuance in possession.<sup>28</sup> The court will discharge a receiver appointed at the instance of the officers of a corporation where it appears to have been with intent to wreck the corporation, and was without the consent of the board of directors.<sup>29</sup> A corporation which is insolvent may legally consent to foreclosure of its mortgage.<sup>30</sup> Generally, any shareholder or creditor of the corporation may apply for the appointment of a receiver; but the State can not apply for such appointment after forfeiture of the charter.<sup>31</sup> A mortgagee of a street railway company in default for non-payment of taxes and in danger of forfeiture of its grant from the city, may have a receiver appointed to raise a loan and pay the taxes.<sup>32</sup>

**§ 1221. (b) Who may be appointed. Validity of appointment.** **Temporary receiver.**—The rule is against appointment as receiver, of any stockholder, officer, or other person interested on either side, without unanimous consent.<sup>33</sup> But exception is made where only the officers are capable of taking charge.<sup>34</sup> A trust company may be appointed receiver.<sup>35</sup> A corporation may be appointed receiver of another corporation.<sup>36</sup> A creditor, share-

<sup>26</sup> *Olmsted v. Distillery, etc. Co.* (1895), 67 Fed. 24; *Towle v. American, etc. Soc.* (1894), 60 Fed. 131; *In re Balton*, 47 La. Ann. 614 (1895).

<sup>27</sup> *Murray v. Superior Court*, 129 Cal. 628 (1900), 62 Pac. 191.

<sup>28</sup> *Quincy, etc. R. R. Co. v. Humphrey* (1892), 145 U. S. 82; *United States Trust Co. v. Wabash, etc. Ry. Co.* (1893), 150 U. S. 287; *Clarke v. Central, etc. Co.* (1893), 54 Fed. 556; *Cleveland, etc. R. R. Co. v. Knickerbocker Trust Co.* (1894), 64 Fed. 623.

<sup>29</sup> *Walters v. Anglo-American, etc. Co.* (1892), 50 Fed. 316.

<sup>30</sup> *Dickerman v. Northern T. Co.* (1900), 176 U. S. 181.

<sup>31</sup> *Havemeyer v. Superior Court*, 84 Cal. 327, 10 L. R. A. 627, 18 Am. St. Rep. 192.

<sup>32</sup> *Union St. Ry. Co. v. City of*

*Saginaw* (1897), 115 Mich. 300, 73 N. W. 243.

<sup>33</sup> *Finance Co. v. Charleston, etc. R. R. Co.* (1891), 45 Fed. 436; *Farmers' etc. Co. v. Northern Pac. R. R. Co.* (1894), 61 Fed. 546; *State Trust Co. v. National, etc. Mfg. Co.* (1893), 72 Fed. 575; *Wood v. Oregon, etc. Co.* (1893), 55 Fed. 901.

<sup>34</sup> *Fowler v. Jarvis, etc. Co.*, 63 Fed. 888 (1894); *Barber v. International Co.* (1901), 48 Atl. 758, 73 Conn. 587; *McGilliard v. Donaldsonville, etc.* (1900), 104 La. 544, 29 So. 254; *Moran v. Hosmer* (1900), 125 Mich. 6, 83 N. W. 104, 81 Am. St. Rep. 148.

<sup>35</sup> *Kimmerle v. Dowagiac Mfg. Co.* (1895), 105 Mich. 640, 63 N. W. 529.

<sup>36</sup> *Vermont, etc. R. R. Co. v. Vermont Central R. R. Co.*, 46 Vt. 792 (1873).

holder, or officer of the corporation, may be appointed, or, the court may appoint any suitable person.<sup>37</sup> A non-resident's appointment is disfavored,<sup>38</sup> though he is appointed in exceptional cases.<sup>39</sup> The object of the court is in having a receiver, experienced in railroad management, to operate the road, preserve the property preparatory to sale, and relieve the court from responsibility for its management.<sup>40</sup> A receiver is either chancery receiver who is appointed as assignee of the property, title to which is, for the time, vested in him, or he is statutory receiver, or receiver at common law pending the suit, and does not take title.<sup>41</sup> A receiver may be appointed in vacation.<sup>42</sup> The statute is strictly construed, as to prescribed time of appointment. If made prematurely, it may be set aside; as, if made before final judgment of dissolution, or of forfeiture of charter, or if not made within the time limited after the decree of dissolution.<sup>43</sup> The date of the entry of the order of appointment is the time when the receivership takes effect.<sup>44</sup>

*Validity.*—The validity of receivers appointment can be contested only in the court where he is appointed.<sup>45</sup> Its validity can not be attacked in a suit where he seeks to be made a party.<sup>46</sup> A non-resident creditor, without notice, may attack the proceedings on allegations that they were fraudulent.<sup>47</sup> Where the court had no jurisdiction the receiver may be disregarded.<sup>48</sup>

<sup>37</sup> Moran v. Hosmer (Mich.), 83 N. W. 1004, 81 Am. St. Rep. 148; Western, etc. R. Co. v. Rollins, 82 N. C. 523.

<sup>38</sup> Boston v. Brines Chase Co. (1896), 175 Pa. St. 209.

<sup>39</sup> Farmers, etc. Co. v. Cape Fear, etc. R. R. Co. (1894), 62 Fed. 675.

<sup>40</sup> Continental Trust Co. v. Toledo, etc. R. R. Co. (1894), 59 Fed. 514.

<sup>41</sup> Stokes v. Hoffman House, 167 N. Y. 554 (1901), 60 N. E. 667, 53 L. R. A. 870.

<sup>42</sup> Greeley v. Provident Sav. Bank (1891), 103 Mo. 212, 15 S. W. 429.

<sup>43</sup> Chamberlain v. Rochester, etc. Co., 7 Hun (N. Y.), 557; *In re Boynton*, etc. Co., 34 Hun (N. Y.), 269; Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St.

Rep. 192, 10 L. R. A. 627; State, etc. Co. v. Superior Court, 101 Cal. 135.

<sup>44</sup> Hatfield v. Cummings, 140 Ind. 547; Connecticut, etc. Co. v. Rockbridge Co. (1895), 73 Fed. 709; East Tenn., etc. v. Atlantic, etc. R. R. Co. (1892), 49 Fed. 608; Wilcox v. National, etc. Bank, 67 N. Y. App. Div. 466 (1902).

<sup>45</sup> Basting v. Ankeny (1896), 64 Minn. 133, 66 N. W. 266; Halfield v. Cummings (1893), 152 Ind. 280, 53 N. E. 231; Pitt v. New Mammoth, etc. Co. (1901), 23 Utah, 623, 65 Pac. 1076.

<sup>46</sup> Andrews v. Steele, etc., 57 Neb. 173 (1898), 77 N. W. 342.

<sup>47</sup> Dobson v. Peck, etc. Co., 103 Fed. 904 (1900).

<sup>48</sup> State v. District Court, 21 Mont. 155 (1898), 53 Pac. 272, 69 Am. St. Rep. 645.

*A temporary receiver* will not be appointed of a corporation whose only assets are stock in gas companies, mortgaged by the former company, and no fraud or mismanagement is shown.<sup>49</sup> A temporary receivership does not relieve the corporation from pre-existing liability.<sup>50</sup> The appointment of temporary receiver, pending dissolution proceedings, does not affect actions pending against the corporation, or divest it of title to its property, or prevent it from suing or being sued.<sup>51</sup>

**§ 1222. (c) Whether creditors unsecured may have appointment.**—A receiver will not be appointed at instance of a judgment creditor, where mortgagee is in possession, though collusively. In such case an injunction will be granted, and the mortgagee required to apply rents and profits to payment of the mortgage.<sup>52</sup> If appointed simply in interest of the corporation, but not of its creditors, a new receiver will be appointed at instance of a creditor, or mortgage trustee.<sup>53</sup>

*Appointment.*—It is only to protect their claims, that creditors are ever entitled to interfere in corporate affairs. Though the corporation be insolvent, so long as it honestly conducts its business, a creditor has no absolute right to the appointment of a receiver of the corporate assets;<sup>54</sup> but he is entitled to such appointment, on the showing that the corporation is admittedly insolvent, and that there is danger that it will misappropriate its assets to his injury.<sup>55</sup> The appointment of a receiver is usually within the discretion of the court.<sup>56</sup> Stockholders are neither necessary or proper parties, to a creditors bill for appointment of receiver.<sup>57</sup> A judgment creditor may have a receiver appointed without return of execution unsatisfied, as against objection of another creditor, if the corporation does not object.<sup>58</sup> A judgment creditor can not have receiver appointed in another State

<sup>49</sup> *Brady v. Bay State, etc. Co.* (1901), 106 Fed. 584.

<sup>50</sup> *Diamond, etc. Co. v. San Antonio, etc. Ry. Co.* (1895), 11 Tex. Civ. App. 587.

<sup>51</sup> *Decker v. Gardener*, 124 N. Y. 334, 26 N. E. 814, 33 S. W. 987, 11 L. R. A. 480.

<sup>52</sup> *United States v. Masich*, 44 Fed. 10 (1890).

<sup>53</sup> *Phinizy v. Augusta, etc. R. R.* (1893), 56 Fed. 273; *Pennsylvania Co. v. Jacksonville* (1893), 55 Fed. 131.

<sup>54</sup> *Catlin v. Eagle Bank*, 6 Conn. 233; *Bishop v. Brainerd*, 28 Conn. 289; *Hollins v. Briarfield Coal, etc. Co.*, 150 U. S. 371; *Falmouth Nat. Bank v. Canal Co.*, 166 Mass. 550.

<sup>55</sup> *Lothrop v. Stedman*, 42 Conn. 583, 13 Blatchf. 141.

<sup>56</sup> *Railway Co. v. Sowter*, 2 Wall. 510.

<sup>57</sup> *Bristol, etc. Co. v. Thomas*, 93 Va. 396 (1896), 25 S. E. 110.

<sup>58</sup> *Enos v. New York, etc. R. R. Co.* (1900), 103 Fed. 47.

without first obtaining judgment there.<sup>59</sup> A judgment creditor can not have receiver appointed, for an insolvent corporation, without return of execution unsatisfied, in the county where the corporation is located.<sup>60</sup> Until a general creditor obtains judgment and return of execution unsatisfied, a receiver will not be appointed at his instance.<sup>61</sup> The corporation can not assign for benefit of creditors, after a judgment creditor has applied for appointment of receiver.<sup>62</sup> A receiver will not be appointed for a corporation at the instance of creditors, or of an insolvent partnership upon the charge that one of the partners is president of the corporation, and is so conducting the business as to defraud the partnership.<sup>63</sup> A receiver will not be appointed where the purpose is simply to delay other creditors, and if appointed, he will be discharged on such showing. The receivership will not be continued in order solely to give the corporation time to raise money for payment of its debts.<sup>64</sup> As exception to the general rule against appointment of receiver on application of general creditor, until after judgment and return of execution, is:—That where the insolvency of the corporation is shown, the debt acknowledged, and it appears clear that the obtaining of judgment and execution is a proceeding involving useless expense of time and money,—the court will appoint a receiver at the instance of a general creditor.<sup>65</sup> No prior judgment is necessary

<sup>59</sup> Barber v. International Co. (Conn. 1901), 48 Atl. 758.

<sup>60</sup> Minkler v. United States Sheep Co. (1895), 4 N. D. 507, 62 N. W. 594, 33 L. R. A. 546; Etowah Mining Co. v. Wills, etc. Co. (1895), 106 Ala. 492; Brown v. Lake Superior Iron Co., 134 U. S. 530 (1896).

<sup>61</sup> Putnam v. Jacksonville, etc. Ry. Co. (1893), 61 Fed. 440; Hollins v. Brierfield, etc. Co. (1893), 150 U. S. 371; Texas, etc. Assn. v. Storrow (1899), 92 Fed. 5; Smith Dimmick, etc. Co. v. Teague, 119 Ala. 385 (1898), 24 So. 4; Builders, etc. Co. v. Lucas (1898), 119 Ala. 202, 24 So. 416; Steele v. Laurens, etc. Co. (1896), 98 Ga. 329, 24 S. E. 755.

<sup>62</sup> Belmont Nail Co. v. Columbia, etc. Co. (1891), 46 Fed. 8;

Monarch Co. v. Bank, etc. (Ky. 1898), 44 S. W. 956.

<sup>63</sup> Cabaniss v. Rees', etc. Co. (1902), 116 Fed. Rep. 318.

<sup>64</sup> Duncan v. Treadwell Co., 82 Hun, 376 (1894); *In re Philadelphia, etc. R. R.* (1881), 14 Phila. 501; *East Tenn., etc. R. R. v. Atlanta, etc. R. R.* (1892), 49 Fed. 608; *Platt v. Philadelphia, etc. R. R. Co.* (1895), 65 Fed. 872; *Coliseum v. Interstate, etc. Co.* (1899), 123 Ala. 512, 26 So. 122; *Taber v. Royal, etc. Co.* (1899), 124 Ala. 681, 26 So. 252.

<sup>65</sup> Tompkins Co. v. Catawba Mills (1897), 82 Fed. 780; Chicago, etc. Ry. v. Kenney (Ind. 1901), 62 N. E. 26; Citizens, etc. Co. v. Union, etc. Co. (1900), 106 Fed. 97; Falmouth, etc. Bank v. Cape, etc. Co. (1896), 166 Mass. 550.

in case breach of trust, waste, or concealment of assets, or conspiracy is shown;<sup>66</sup> or where the corporation has ceased business and been abandoned by the directors.<sup>67</sup> Objection that the creditor is only a simple creditor, comes too late, after proceedings have reached readiness for a decree.<sup>68</sup> A receiver will be appointed for the lessee, where the lessor has a lien, his property is for rent, and other creditors are levying upon the property.<sup>69</sup> Under statutory provision, the State court must appoint, where no objection is made.<sup>70</sup> The federal courts can not appoint a receiver for a general creditor.<sup>71</sup> Upon valid assignment made for benefit of creditors, the court can not appoint a receiver of the property for general creditors.<sup>72</sup> In any proceeding for appointment of receiver, the corporation is entitled to notice and hearing. Judgment creditors cannot have appointed a receiver *ex parte*,<sup>73</sup> except in extraordinary cases of imminent danger.<sup>74</sup> When ordinary remedies, either at law or in equity, are sufficient to enable unsecured creditors to enforce the payment of their claims, they can not (even though they have obtained judgment against the company) ordinarily procure the appointment of a receiver merely on the ground that it fails or refuses to satisfy their claims,<sup>74a</sup>

<sup>66</sup> Merchants' Nat. Bank v. Chattanooga, etc. Co. (1892), 53 Fed. 314.

<sup>67</sup> Nunnally v. Strause (1897), 94 Va. 255, 26 S. E. 580; Doe v. Northwest, etc. Co., 64 Fed. 928 (1894).

<sup>68</sup> Brown v. Lake Superior Iron Co. (1890), 134 U. S. 530.

<sup>69</sup> Kanawha, etc. Co. v. Ballard, etc. Co. (1898), 43 W. Va. 721, 29 S. E. 514.

<sup>70</sup> State v. Bank of N. E. (1893), 55 Minn. 139, 56 N. W. 576; State, etc. Ins. Co. v. San Francisco, etc. (1894), 101 Cal. 135; Darragh v. Wetter Mfg. Co. (1897), 78 Fed. 7; San Antonio, etc. R. R. v. Davis (Tex. 1895), 30 S. W. 693; Morrow, etc. Co. v. N. E. Shoe Co., 60 Fed. 341 (1894); Albert v. Clarendon, etc. Co. (N. J. 1891), 23 Atl. 8; Cook v. East Trenton, etc. Co. (1894), 53 N. J. Eq. 29.

<sup>71</sup> Harrison v. Farmers, etc. Co. (1899), 94 Fed. 728.

<sup>72</sup> Garden City, etc. Co. v. Geil-

fuss (1893), 86 Wis. 612, 57 N. W. 349.

<sup>73</sup> Hook v. Bosworth (1894), 64 Fed. 443; Merriam v. St. Louis, etc. Ry. (1896), 136 Mo. 145, 36 S. W. 630; Cabbaniss v. Reco, 116 Fed. 318 (1902); State v. Clancy (1897), 20 Mont. 284, 50 Pac. 852; Wabash R. R. v. Dykeman (1892), 133 Ind. 56, 32 N. E. 823; Chicago, etc. Ry. Co. v. Cason (1892), 133 Ind. 49, 32 N. E. 827; Davelear v. Blue, etc. Co. (1901), 110 Wis. 470, 86 N. W. 185; Louisville, etc. R. R. v. Schmidt (Ky. 1899), 52 S. W. 835.

<sup>74</sup> North America v. Walker, 109 Fed. 101 (1901); Pacific, etc. Co. v. Allen (1901), 109 Fed. 515; Louisville, etc. R. R. v. Schmidt (Ky. 1890), 52 S. W. 835; Smith v. Ely, etc. Co. (1901), 79 Miss. 266, 30 So. 653.

<sup>74a</sup> Beach on Railways, § 696; Sagé v. Memphis, etc. R. Co., 125 U. S. 361; Milwaukee & M. R. Co. v. Soutter, 2 Wall. 510, 523.

unless they can show that the company is insolvent and that there is danger of its wasting its assets.<sup>74b</sup> But an application for the appointment of a receiver of a corporation, will not be granted on a mere allegation of insolvency and suspension of business for want of funds, it not being shown what facts and circumstances would constitute the insolvency.<sup>74c</sup> While the appointment of receivers does not follow as a matter of course, upon a decree declaring a corporation insolvent, but rests in the discretion of the chancellor, yet, generally, receivers will be appointed, unless it be shown to be for the interest of the creditors and stockholders to leave the directors in charge of the affairs.<sup>74d</sup>

**§ 1223. (d) The order appointing receiver. Effect upon pending proceedings.**—The court's order appointing receiver must comply with the requirements of the statute.<sup>75</sup> The effect of the appointment of a permanent receiver for a corporation, pending proceedings to wind up its affairs, or after its dissolution, suspends the prosecution of any action begun by the corporation, and vests all right of action in the receiver.<sup>76</sup> No action can be brought against the corporation after judgment of dissolution.<sup>77</sup> But the appointment of receiver, pending proceedings for dissolution, does not prevent action against the corporation, any time before decree of dissolution, if the cause of action accrued before such appointment.<sup>78</sup>

**§ 1224. (e) Proof of appointment. Effect of appointment. Statute of limitation. Pending suit. Bond of receiver.**—A certificate copy of the pleadings and order of court are sufficient

<sup>74b</sup> *Turnbull v. Prentis Lumber Co.*, 55 Mich. 387; *Powers v. Hamilton Paper Co.*, 60 Wis. 23. *Cf. Kelley v. Alabama, etc. R. Co.*, 58 Ala. 489. But it is not necessary in such a case that they should first sue out an execution, where he deems it useless and no objection is made to the application for a receiver on the ground of his failure so to do. *Sage v. Memphis, etc. R. Co.*, 125 U. S. 361, per Harlan, J.

<sup>74c</sup> *Newfoundland R. Construction Co. v. Schack*, 40 N. J. Eq. 222; *Beach on Railways*, § 702.

<sup>74d</sup> So where it appeared that the insolvency of a corporation had been long known to the directors, and that with such knowl-

edge sales of its property had been made to them, to pay antecedent debts due to them, a receiver was appointed to investigate the legality of these sales, although the corporation appeared to have no property. *Nichols v. Perry, etc. Co.*, 11 N. J. Eq. 126; *Mercantile Trust Co. v. Missouri, etc. Ry. Co.*, 36 Fed. Rep. 221; *Beach on Receivers*, § 347.

<sup>75</sup> *In re Christian Jensen Co.*, 128 N. Y. 550, 28 N. E. 665.

<sup>76</sup> *Kokomo, etc. Co. v. Pittsburgh, etc. Co.* (Ind. App.), 58 N. E. 211.

<sup>77</sup> *Hetezel v. Tannehill, etc. Co.*, 4 Abb. N. C. (N. Y.) 40.

<sup>78</sup> *Fleischauer v. Dittenhoefer*, 49 N. Y. (Super. Ct.) 311.

proof of his appointment and right to bring suit.<sup>79</sup> A receiver may sue in his own name as receiver, on a note given to the corporation.<sup>80</sup> The running of the statute of limitations in favor of the corporation is not suspended by the appointment of a receiver.<sup>81</sup> Although a receiver has been appointed in another State, a stockholder may bring a suit in behalf of the corporation, in case of fraud by the directors.<sup>82</sup> After appointment of a receiver and injunction upon the corporate officers, the corporation can not lawfully appear in a suit in another State.<sup>83</sup> A corporation is not extinguished by the appointment of a receiver. After such appointment it may hold meetings and elect officers without leave of court.<sup>84</sup> A pending suit is not stayed by the appointment of a receiver.<sup>85</sup> A receiver *pendente lite* has no powers, except those expressly given by order of court.<sup>86</sup> He may not reduce wages of employees, without a hearing.<sup>87</sup>

*Bond.*—The court in its discretion will decide whether the receiver shall give bond. If not required it is not necessary to be given.<sup>88</sup>

**§ 1225. Receivers of dissolved corporations.**—The mere fact that a corporation has been dissolved, does not in every instance give the minority stockholders the right to have a receiver appointed and the assets sold, as there may be circumstances which will justify a court of equity in ascertaining the value of the assets without a sale, and in making a distribution to the members on that basis.<sup>89</sup> When directors and officers of the defunct corporation are, by statute, made trustees of the assets for the

<sup>79</sup> Taft v. Pullen (Mich. 1902), 90 N. W. 329; Person v. Leary, 126 N. C. 504 (1900), 36 S. E. 35; Coddington v. Canaday (1901), 157 Ind. 243, 61 N. E. 567; Ocean, etc. Co. v. Wilder (1899), 107 Ga. 220, 33 S. E. 179; Spring v. Bowery Nat. Bank (1902), 63 Hun, 505.

<sup>80</sup> Hardin v. Sweeny (1896), 14 Wash. 129, 44 Pac. 138.

<sup>81</sup> Jackson v. Fidelity, etc. Co. (1896), 75 Fed. 359.

<sup>82</sup> Fitzgerald v. Fitzgerald, etc. Co. (1894), 41 Neb. 374, 59 N. W. 838.

<sup>83</sup> Rust v. United Waterworks, 70 Fed. 129 (1895).

<sup>84</sup> Commonwealth v. Overholt, 23 Pa. Super. Ct. 199 (1903); Mer-

cantile Trust Co. v. Farmers' L. & T. Co. (1897), 81 Fed. 254.

<sup>85</sup> Sigua, etc. Co. v. Brown, 171 N. Y. 488 (1902).

<sup>86</sup> Decker v. Gardner (1891), 124 N. Y. 334, 11 L. R. A. 480; People v. St. Nicholas Bank (1894), 76 Hun, 522, 45 N. E. 1129.

<sup>87</sup> Continental Trust Co. v. Toledo, etc. R. R. (1894), 59 Fed. 514.

<sup>88</sup> Wilson v. Welch (1892), 157 Mass. 77; Hegewish v. Silver, 140 N. Y. 414 (1893); Metropolitan Nat. Bank v. Commercial St. Bank (1898), 104 Iowa, 682.

<sup>89</sup> Baltimore, etc. R. Co. v. Cannon (Md. 1890), 8 Ry. & Corp. L. J. 358.

benefit of creditors, as is the case in some States,<sup>90</sup> the business of settling its affairs can not be taken from them and put into a receiver's hands unless there has been fraud on their part.<sup>91</sup> When a receiver has been appointed, the title to all the company's property vests in him as trustee for the benefit of creditors and stockholders.<sup>92</sup> Nor does the mere fact that a receiver has been appointed, work a dissolution of the corporation.<sup>93</sup> And this rule applies to National banks, as well as to other corporations.<sup>94</sup>

*Where the corporate existence of a dissolved corporation is continued by statute in the hands of the officers of the corporation for purpose of winding up its affairs, this would seem to oust the former equity jurisdiction to appoint a receiver, except where the corporate property is in peril of seizure, and dissipation by attachments or executions.<sup>95</sup>*

**§ 1226. Jurisdiction of the court. Contempt of court.—** A court of equity, in the absence of any statutory authority, may appoint a receiver after dissolution of a corporation, to administer its assets, and wind up its affairs;<sup>96</sup> or, pending dissolution proceedings, if necessary to protect creditors, and stockholders; or, upon cessation of corporate business, and misuse of the property of the corporation by its officers.<sup>97</sup> The legislature, in the act of repeal of the corporate charter, may appoint a trustee to administer the corporate assets.<sup>98</sup> Where the shareholders had elected the proper person to administer the assets, in case of dissolution, the court should not supersede him by appointment of a receiver.<sup>99</sup> Where, similarly, the charter vested the winding up of

<sup>90</sup> *E. g.* N. Y. Laws of 1890, ch. 563, §§ 19, 20; Central City Sav. Bank v. Waller, 66 N. Y. 424, 428; Frothingham v. Barney, 6 Hun, 366, 372; Towar v. Hale, 46 Barb. 361, 365; Paola Town Co. v. Krutz, 22 Kan. 728. See Bliss v. Mateson, 45 N. Y. 22.

<sup>91</sup> Follett v. Field, 30 La. Ann. 161.

<sup>92</sup> Bacon v. Robertson, 18 How. 480; Heath v. Barmore, 50 N. Y. 302; Owen v. Smith, 31 Barb. 641; Towar v. Hale, 46 Barb. 361; Life Assn. v. Fassett, 102 Ill. 315, 323; People v. College of California, 38 Cal. 166.

<sup>93</sup> Hollingshead v. Woodward, 107 U. S. 96; Hutchison v. Crutcher, 98 Tenn. 421; Kincaid

v. Dwinell, 59 N. Y. 548; Moseby v. Burrow, 52 Tex. 396.

<sup>94</sup> National Bank v. Deposit Co., 161 U. S. 1.

<sup>95</sup> Von Glahn v. De Rosset, 81 N. C. 467; Olmstead v. Distilling, etc. Co., 73 Fed. 44.

<sup>96</sup> Conro v. Gray, 4 How. Pr. (N. Y.) 166; Bacon v. Robertson, 18 How. (U. S.) 480; Wilson v. Leary, 120 N. C. 90, 38 L. R. A. 240, 58 Am. St. Rep. 778; High-tower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412.

<sup>97</sup> Conro v. Gray, 4 How. Pr. (N. Y.) 166.

<sup>98</sup> Western, etc. R. Co. v. Rollins, 82 N. C. 523.

<sup>99</sup> Follet v. Field, 30 La. Ann. 161.

the corporate affairs through commissioners appointed by the stockholders, who at suit of creditors had consented to appointment of a receiver by the court, such appointment will not be disturbed upon appeal by creditors.<sup>1</sup> In such cases, and where the corporation is not indebted, and the shareholders do not object to such corporate appointee, the court will exercise its discretion, whether to leave the winding up of the corporate business in his hands.<sup>2</sup> Although the statute may make the corporate officers trustees for winding up the corporate business, a court of equity has jurisdiction to appoint a receiver, in its discretion, for protection of creditors or shareholders against fraud or damaging delay of the trustees to execute their trust.<sup>3</sup> Where the general law makes the directors trustees for winding up the corporate business of a dissolved corporation, the legislature, upon dissolving a corporation, may nevertheless appoint other trustees for that purpose.<sup>4</sup> The court's jurisdiction continues until all the expenses of the receiver are paid.<sup>5</sup>

*Contempt of court.*—To levy execution, attachment or garnishment upon property in the hands of a receiver, is contempt of court.<sup>6</sup> "Strikers," who interfere with the employes of a receiver in the operation of a railroad, will be punished for contempt of court.<sup>7</sup> The officers of a State court are guilty of contempt, in undertaking to obey its injunction against the receiver's action in a foreclosure suit, in tearing up and selling the tracks of unprofitable parts of a railroad under authority of the court which appointed him.<sup>8</sup>

**§ 1227. Federal receivers.**—State statutes regulating the powers and duties of receivers, do not apply to receivers appointed by a federal court.<sup>9</sup> The enforcement of a judgment obtained against a federal receiver, is controlled by the federal court which

<sup>1</sup> *In re Louisiana, etc. Deposit Co.*, 35 La. Ann. 196.

<sup>2</sup> *State v. Herdic Coach Co.*, 35 La. Ann. 245.

<sup>3</sup> *City Pottery Co. v. Yates*, 37 N. J. Eq. 543; *In re Pontius*, 26 Hun (N. Y.), 232; *Havemeyer v. Superior Court*, 84 Cal. 327, 10 L. R. A. 627, 18 Am. St. Rep. 192.

<sup>4</sup> *McLaren v. Pennington*, 1 Paige (N. Y.), 102.

<sup>5</sup> *La Junta, etc. Co. v. Hess*, 71 Pac. Rep. 415 (Colo. 1903).

<sup>6</sup> *Citizens' Bank v. Bay, etc.*, 110

Mich. 683 (1896); *Campau v. Detroit, etc. Club* (Mich. 1902), 9 N. W. 49; *Re Christian, etc. Co.*, 128 N. Y. 550 (1891); *Mercantile Trust Co. v. Baltimore, etc. R. R.* (1897), 79 Fed. 389.

<sup>7</sup> *Waterhouse v. Comer* (1903), 55 Fed. 149.

<sup>8</sup> *Royal Trust Co. v. Washburne, etc. Ry.* (1901), 113 Fed. 531.

<sup>9</sup> *Guaranty, etc. Co. v. Galveston, etc. R. R.* (1901), 107 Fed. 311.

appointed him.<sup>10</sup> A suit against a federal receiver, attacking his title to property in his possession, can not be brought except upon leave of court.<sup>11</sup> The act of Congress allowing federal receivers to be sued in State or federal courts, without leave of court first obtained, does not apply to suits on claims existing at time of his appointment, or to suits brought after foreclosure and distribution of assets.<sup>12</sup> A federal receiver may be enjoined, in the State court, against tearing up the tracks of a railroad, under order of the federal court.<sup>13</sup> Where the receiver can operate a railroad only at a loss, the court may authorize him to tear it up and sell the material.<sup>14</sup> A city may insist upon removing the tracks of a railway occupying the streets without authority, although a receiver for the mortgagee is in possession.<sup>15</sup> Although a federal receiver is in possession of a railroad, a city may regulate the speed of trains running through the city.<sup>16</sup>

**§ 1228. Powers and duties of receivers.**—Though a receiver represents the creditors of a corporation, he also represents the corporation and its stockholders.<sup>17</sup> A receiver in charge of a railroad may, without order of court, agree to pay rebates, and may establish freight rates.<sup>18</sup> He can not deposit the corporate funds in bank to his personal credit.<sup>19</sup> A receiver must not continue the business of a corporation at a loss, but must apply to the court for authority to sell it.<sup>20</sup> He requires express authority to condemn land,<sup>21</sup> or to lay tracks across another railroad.<sup>22</sup> He may not obstruct a highway contrary to statute.<sup>23</sup> A street railway receiver may compel the use on the cars, of money boxes for deposit of fares.<sup>24</sup> The receiver does not need express authority for or-

<sup>10</sup> Dillingham v. Hawk (1894), 60 Fed. 494.

<sup>11</sup> Case Plow Works v. Finks, 81 Fed. 529 (1897).

<sup>12</sup> Farmers' etc. Co. v. Chicago, etc. R. R. (1902), 118 Fed. 204.

<sup>13</sup> *In re Attorney General*, 88 N. W. Rep. 912 (Wis. 1902).

<sup>14</sup> Jack v. Williams (1902), 113 Fed. 823.

<sup>15</sup> Louisville Trust Co. v. Cincinnati, etc. Ry. (1897), 78 Fed. 307.

<sup>16</sup> Erb v. Morasch (1900), 177 U. S. 584.

<sup>17</sup> Hays v. Pierson (N. J. Eq. 1904), 58 Atl. 728.

<sup>18</sup> Kan. Pac. Ry. v. Bayles, 19

Colo. 348 (1894), 35 Pac. 774; Bonner v. Franklin, etc. Assn., 4 Tex. Civ. App. 166 (1893), 23 S. W. 317.

<sup>19</sup> Schwartz v. Keystone Oil Co. (1893), 153 Pa. St. 383, 25 Atl. 1018.

<sup>20</sup> State, etc. Bank v. Fanning, etc. Co. (Iowa, 1902), 92 N. W. 712.

<sup>21</sup> Minneapolis, etc. Ry. v. Minneapolis, etc. Ry. (1895), 61 Minn. 502.

<sup>22</sup> Chattanooga, etc. Ry. v. Felton (1895), 69 Fed. 273.

<sup>23</sup> Felton v. Ackerman, 61 Fed. 225 (1894).

<sup>24</sup> Morley v. Saginaw, etc., 117 Mich. 246 (1898), 41 L. R. A. 117.

dinary acts of administration. The court will not interfere with him except for bad faith or extravagance.<sup>25</sup> The court may compel the books of the corporation, and its seal, to be delivered to him.<sup>26</sup> Ordinarily the stockholders will be allowed to examine the books in the receiver's hands.<sup>27</sup> He may borrow money to pay interest on the mortgage.<sup>28</sup> *Pendente lite* he may be ordered to make a lease of all the property.<sup>29</sup> He may be authorized to loan money to a corporation where he holds its stock.<sup>30</sup> He may be authorized to buy supplies for a hotel for which he is receiver,<sup>31</sup> or to buy machinery for a mining company.<sup>32</sup> Where he is operating a railroad at a loss, he may allow a connecting railroad to operate it as his agent, free of rental<sup>33</sup> Even by order of court, the receiver can not exchange the property of the corporation for the stock of another.<sup>34</sup> Where the purpose of the receivership was to complete a railroad and thereby save certain subsidies, the court will not order a sale before accomplishment of that purpose.<sup>35</sup> Where the receiver holds stock, the court may allow him to sell it in one block instead of by parcels.<sup>36</sup>

**§ 1229. Removal of causes to federal courts.**—The mere fact of his being a federal receiver does not authorize his removal of a suit from the State court to the federal court.<sup>37</sup> A

<sup>25</sup> State, etc. v. Port Royal, etc. Ry. (1898), 89 Fed. 565.

<sup>26</sup> American Const. Co. v. Jacksonville, etc. Ry. (1892), 52 Fed. 937; Engel v. South Metropolitan, etc. Co. (1892), L. R. 1 Ch. 442.

<sup>27</sup> Chable v. Nicaragua Canal Co. (1894), 59 Fed. 846; Commonwealth v. Philadelphia, etc. R. R. (1895), 3 Pa. Dist. 115; State v. Talty (1897), 139 Mo. 379; Henezy v. Langdon, Henezy, etc. Co., 80 Fed. 178 (1897); McElree v. Darlington (1898), 187 Pa. St. 593, 67 Am. St. Rep. 592.

<sup>28</sup> Lloyd v. Chesapeake, etc. R. R. Co. (1895), 65 Fed. 351; Park v. New York, etc. R. R. (1894), 64 Fed. 190; Farmers' etc. Co. v. Fidelity, etc. Co. (Tex. 1897), 41 S. W. 113; Peoria, etc. Ry. Co. v. Central, etc. Co. (1897), 83 Fed. 910.

<sup>29</sup> Farmers' etc. Co. v. Eaton (1902), 114 Fed. 14; Western Union T. Co. v. Boston Safe, etc. Co. (1898), 87 Fed. 788, (1901), 112 Fed. 37; Trust v. Staten

Island, etc. R. R. (1896), 6 N. Y. App. Div. 148.

<sup>30</sup> Kalbfleisch v. Kalbfleisch, 13 N. Y. Supp. 397 (1891).

<sup>31</sup> Highland, etc. R. R. v. Thornton (1894), 105 Ala. 225, 16 So. 699.

<sup>32</sup> Free, etc. Co. v. Spiers, 135 Cal. 130.

<sup>33</sup> South Carolina, etc. R. R. v. Carolina, etc. Ry. (1899), 93 Fed. 543.

<sup>34</sup> People v. Anglo-American, etc. Assn. (1901), 60 N. Y. App. Div. 389.

<sup>35</sup> Bibber-White Co. v. White River, etc. R. R. (1901), 110 Fed. 472.

<sup>36</sup> First Nat. Bank v. Bunting & Co. (Idaho 1900), 63 Pa. 694.

<sup>37</sup> Gableman v. Peoria, etc. Ry. (1900), 179 U. S. 335; Central Trust v. East Tennessee, etc. Ry. (1894), 59 Fed. 523; Carpenter v. Northern Pac. R. R. (1896), 75 Fed. 350.

suit in a State court, by or against a federal receiver, regardless of citizenship of the parties, may be removed to the federal court, where the amount involved is \$2,000 or more.<sup>38</sup> The federal receiver can not remove a cause to the federal court, where he is jointly sued with another who is not entitled to such removal.<sup>39</sup> He may remove a suit against him to the federal court, though there is no allegation that he is a federal receiver.<sup>40</sup> He can not remove to the federal court a suit that was pending in attachment against the corporation upon his appointment by the federal court, where the amount involved is less than \$2,000.<sup>41</sup> Where a suit against a federal receiver is to determine what are his rights to certain corporate property, the suit may be removed to the federal court, regardless of the amount of value of the property.<sup>42</sup> A suit against officers of a national bank may be removed to the federal court.<sup>43</sup> The fact that the receiver of a national bank was appointed by the comptroller, does not authorize removal of pending suits to the federal court.<sup>44</sup> Such a suit is not so removable where it does not involve amount of \$2,000.<sup>45</sup> *Mandamus* proceedings against a receiver are so removable.<sup>46</sup> A temporary federal receiver, in foreclosure suit against him, can not remove the suit to the federal court.<sup>47</sup>

**§ 1230. Suits by a receiver.**—The receiver can bring no suit without leave of the court.<sup>48</sup> In the absence of statute, he is generally allowed, by comity between the States, to bring suits in another State upon showing that no creditor's rights there will be injured.<sup>49</sup> In New York, a foreign receiver of a foreign corpora-

<sup>38</sup> Tompkins v. McLeod (1899), 96 Fed. 927; Gilmore v. Herrick (1899), 93 Fed. 525; Pitkin v. Cowen (1899), 91 Fed. 599; Board of Comm'r's v. Pierce (1898), 90 Fed. 764; Jewett v. Whitcomb, 69 Fed. 417 (1895); Land v. Chicago, etc. Ry. (1899), 78 Fed. 385.

<sup>39</sup> Marrs v. Felton (1900), 102 Fed. 775.

<sup>40</sup> Winters v. Drake (1900), 102 Fed. 545.

<sup>41</sup> Pendleton v. Lutz (1900), 78 Miss. 322, 29 So. 164, 51 L. R. A. 649.

<sup>42</sup> Shinney v. North American, etc. Co. (1899), 97 Fed. 9.

<sup>43</sup> Bailey v. Mosher (1899), 95 Fed. 223.

<sup>44</sup> Wichita Nat. Bank v. Smith (1896), 72 Fed. 568.

<sup>45</sup> Hallam v. Tillinghast (1896), 75 Fed. 849.

<sup>46</sup> State v. Northern Pac. R. R. (1896), 75 Fed. 333.

<sup>47</sup> Lincoln v. Lincoln St. Ry., 77 Fed. 658 (1896).

<sup>48</sup> Bishop v. McKillican (1899), 124 Cal. 321, 71 Am. St. Rep. 68; Simmons v. Taylor (Tenn. 1901), 63 S. W. 1123; Darner v. Gatewood (Neb. 1902), 89 N. W. 603; Rhodes v. Hilligoss (1896), 16 Ind. App. 478; Pierce v. Jones (1900), 24 Ind. App. 286.

<sup>49</sup> Rogers v. Riley (1896), 80 Fed. 759; Robertson v. Staed, 135 Mo. 135 (1896), 33 L. R. A. 203,

tion is not permitted to apply for appointment there of a receiver of such corporation.<sup>50</sup> All claims by or against a federal receiver may be adjudicated by the federal court, regardless of citizenship, and although the amount is less than \$2,000;<sup>51</sup> and where the decree of the circuit court is final in suits brought by the receiver, a decree of the circuit court of appeals is final.<sup>52</sup> By reason alone of his appointment by the federal court, he is not entitled to appeal from a State Supreme court to the Supreme court of the United States.<sup>53</sup> A receiver of a national bank may be sued in the federal court, if the amount involved is \$2,000 or over.<sup>54</sup> A State receiver may sue in the federal court on the ground of diverse citizenship.<sup>55</sup> He stands in place of the stockholders and all the rights of the company reside in him.<sup>56</sup> He may bring or defend any suit which the corporation might have brought or defended.<sup>57</sup> The receiver may obtain possession of the corporate property from the company, by summary order of

58 Am. St. Rep. 569; *Rogers v. Haines* (1894), 103 Ala. 198, 15 So. 606; *Swing v. White River, etc. Co.* (1895), 91 Wis. 517; *Comstock v. Frederickson* (1892), 51 Minn. 350; *Howarth v. Lombard* (1900), 175 Mass. 570, 49 L. R. A. 301; *Root v. Sweeny* (1899), 12 S. D. 43, 80 N. W. 149; *Hale v. Harris* (1900), 112 Iowa, 372; *Iowa, etc. Co. v. Hoag* (1901), 132 Cal. 127; *Fish v. Smith* (1900), 73 Conn. 377, 84 Am. St. Rep. 161; *Howarth v. Angle* (1899), 39 N. Y. App. Div. 151; *Ward v. Pacific, etc. Co.* (1901), 135 Cal. 235; *Evans v. Pease* (1899), 21 R. I. 187; *Small v. Smith* (1901), 14 S. D. 621, 86 N. W. 649, 86 Am. St. Rep. 808; *Lewis v. American, etc. Co.* (1902), 119 Fed. 391; *Hallam v. Ashford* (Ky. 1902), 70 S. W. 197; *Winans v. Gibbs, etc. Mfg. Co.* (1892), 48 Kan. 777, 30 Pa. 163; *Rogers v. Haines* (1892), 96 Ala. 589, 15 So. 606; *Castlemeany v. Templeman* (1898), 87 Md. 586, 41 L. R. A. 367, 67 Am. St. Rep. 363.

<sup>50</sup> *Mabon v. Ongley, etc. Co.*, 156 N. Y. 196 (1898), 50 N. E. 805.

<sup>51</sup> *White v. Ewing* (1895), 159 U. S. 36; *Bowman v. Harris*, 95

Fed. 917 (1899); *Myers v. Hettinger* (1899), 94 Fed. 370; *Brown v. Smith* (1898), 88 Fed. 565; *Brookfield v. Hecker* (1902), 118 Fed. 942; *Bartley v. Hayden*, 74 Fed. 913 (1896); *Bausman v. Denny* (1896), 73 Fed. 69; *Keihl v. South Bend* (1896), 76 Fed. 921; *Gableman v. Peoria, etc. Ry.* (1900), 179 U. S. 335; *Lanning v. Osbearne* (1897), 79 Fed. 657; *Texas, etc. Ry. v. Cox* (1892), 145 U. S. 593.

<sup>52</sup> *Pope v. Louisville, etc. Ry.* (1899), 173 U. S. 573.

<sup>53</sup> *Bausman v. Dixon* (1899), 173 U. S. 113.

<sup>54</sup> *Gilbert v. McNulta* (1899), 96 Fed. 83; *McDonald v. State of Neb.* (1900), 101 Fed. 171; *Smithson v. Hubbell* (1897), 81 Fed. 593.

<sup>55</sup> *Brisenden v. Chamberlain*, 53 Fed. 307 (1892); *Hale v. Tyler* (1900), 104 Fed. 757; *Avery v. Boston, etc. Trust Co.* (1896), 72 Fed. 700; *Phenix Ins. Co. v. Schultz* (1897), 80 Fed. 337.

<sup>56</sup> *Hood v. McNaughton* (1892), 54 N. J. L. 425; *Farwell v. Great W. T. Co.* (1896), 161 Ill. 522.

<sup>57</sup> *Graham, etc. Co. v. Spielmann* (1902), 50 N. J. Eq. 120.

the court, but to obtain possession from persons not parties to the suit, he is generally compelled to sue for possession.<sup>58</sup> His duty is to make any defense to a suit, which the corporation may have made.<sup>59</sup> He may bring suit against the directors' or promoters, for fraud or negligence or *ultra vires* acts.<sup>60</sup> He may sue to set aside illegal transfers, or pledge of the corporate property,<sup>61</sup> or illegal preference given by the insolvent corporation to one of its creditors,<sup>62</sup> or to recover dividends illegally paid.<sup>63</sup> He may be authorized to condemn land for use of railroad.<sup>64</sup> He may replevy corporate property, fraudulently sold to a director.<sup>65</sup> As the receiver represents the creditors as well as the corporation itself,<sup>66</sup> they cannot sue to collect subscription on stock unless he refuses to sue.<sup>67</sup> He may attack a chattel mortgage for improper record.<sup>68</sup> A creditor can not intervene in a suit against stockholders on subscription.<sup>69</sup> Set-off may be pleaded as defense to a suit by the receiver, if the cause of action accrued before his appointment.<sup>70</sup> A receiver may compromise or settle doubtful

<sup>58</sup> Miles v. New, etc. Assn., 95 Fed. 919 (1899); Cheney v. Maumee, etc. Co. (1901), 64 Ohio St. 205; Comer v. Felton (1894), 61 Fed. 731; Louisville, etc. R. R. v. Eakin (1897), 100 Ky. 745, 39 S. W. 416; Wilt v. Reed, etc. Co. (1898), 187 Pa. St. 424; Matter of Muehlfield (1897), 16 N. Y. App. Div. 401; Musgrove v. Gray, 123 Ala. 376 (1899), 82 Am. St. Rep. 124; State v. Denham, 71 Pac. 196 (Wash. 1903).

<sup>59</sup> Thompson v. Huron, etc. Co. (1892), 4 Wash. St. 600, 30 Pac. 741.

<sup>60</sup> Campbell v. Watson (1901), 62 N. J. Eq. 396; Coddington v. Canaday (Ind. 1901), 61 N. E. 567; Central T. Co. v. East Tenn., etc. Co. (1902), 116 Fed. 743; Thompson v. Greeley (1891), 107 Mo. 577; Robinson v. Hall (1894), 59 Fed. 648; Nealis v. Am. Tube Co. (1896), 150 N. Y. 42.

<sup>61</sup> Nevitt v. First Nat. Bank, 91 Hun, 43 (1895); Stonebridge v. Perkins (1894), 141 N. Y. 1; McQueen v. New (1899), 45 N. Y. App. Div. 579.

<sup>62</sup> Stiefel v. New York, etc. Co.

(1897), 14 N. Y. App. Div. 371; Taylor v. Mitchell (1900), 80 Minn. 492.

<sup>63</sup> Hayden v. Thompson (1895), 71 Fed. 60; Hayden v. William, 96 Fed. 279 (1899); Davenport v. Lines (1899), 72 Conn. 118; Stewart v. Marion, etc. Co., 57 N. E. 911 (Ind. 1900).

<sup>64</sup> Minn., etc. Ry. v. Min., etc. Ry. (1895), 61 Minn. 502.

<sup>65</sup> Mish v. Main (1895), 81 Md. 36.

<sup>66</sup> Atkins v. Judson (1898), 33 N. Y. App. Div. 42.

<sup>67</sup> First Nat. Bank v. Dovetail, etc. Co. (1896), 143 Ind. 534; Berry v. Road (Mo. 1902), 67 S. W. 644; Lea v. Iron, etc. Co., 119 Ala. 271 (1898); Links v. Connecticut, etc. Co. (1895), 66 Conn. 277.

<sup>68</sup> Bayne v. Brewer, etc. Co., 90 Fed. 754 (1898).

<sup>69</sup> Voorhees v. Indianapolis Co. (1895), 140 Ind. 220.

<sup>70</sup> Scott v. Armstrong, 146 U. S. 499 (1892); Laybourn v. Seymour (1893), 53 Minn. 105, 39 Am. St. Rep. 579; People v. St. Nicholas Bank (1894), 76 Hun, 522; Salla-

claims.<sup>71</sup> He may discontinue a suit without showing authority of court.<sup>72</sup> Costs in receiver's suits are payable out of the corporate estate,<sup>73</sup> they should be paid as a preferred claim.<sup>74</sup> When he has not been authorized to sue, in his own name, he must sue in the name of the corporation.<sup>75</sup> Even after entry of a foreclosure decree, it may be modified upon an independent bill filed by persons not parties to the suit, where they had made agreement with the receiver as to abandonment of part of a street railway line, and the franchise therefor, which agreement was confirmed by the city and carried out by the parties.<sup>76</sup> Pending proceedings in receivership of an insolvent corporation at the instance of a stockholder, a bank which is no party thereto, but holds deposits to the credit of the corporation which is also its debtor, should not be required to pay over the deposits to the receiver pending the determination of the bank's right to set off.<sup>77</sup> The receiver may recover unpaid subscriptions for the benefit of the shareholders and creditors; but he should not call upon shareholders, for unpaid balances of subscription, in order to pay creditors, until the whole amount of the corporate debt is determined and the liability of each shareholder is fixed.<sup>78</sup> When the corporate assets are in the hands of a receiver, corporate creditors can not maintain any action to appropriate the corporate property. But the statutory liability is not a corporate asset, and corporate creditors, without reference to the receiver, may prosecute their action freely, to recover from the shareholders upon that ground.<sup>79</sup> So a receiver of a corporation, organized under the general manufacturing act, is not vested with the right of action given by

din v. Mitchell (1894), 42 Neb. 859; Yardley v. Clothier (1892), 51 Fed. 506; Wheeling, etc. Ry. v. Cockran (1895), 68 Fed. 141; King v. Armstrong (1893), 50 Ohio St. 222; Fisher v. Knight, 61 Fed. 491 (1894).

<sup>71</sup> Wooster v. Trowbridge, 115 Fed. 722 (1902); Woerz v. Schumacher (1899), 37 N. Y. App. Div. 374; *In re Earle* (1899), 96 Fed. 678; People v. Anglo-American, etc. Assn. (1901), 66 N. Y. App. Div. 9; Morrison v. Lincoln, etc. Co. (Neb. 1902), 89 N. W. 996; Una v. Newark, etc. (N. J. 1900), 46 Atl. 660; Craig v. James (1902), 71 N. Y. App. Div. 238 (1902).

<sup>72</sup> Youtsey v. Hoffman (1901), 108 Fed. 699.

<sup>73</sup> Cumberland, etc. Co. v. Clinton, etc. Co. (N. J. 1903), 54 Atl. 452.

<sup>74</sup> Ephriam v. Pacific R. R. (1902), 136 Cal. 646.

<sup>75</sup> Wilson v. Welch (1892), 157 Mass. 77.

<sup>76</sup> Thompson v. Schenectady Ry. (1903), 119 Fed. 634.

<sup>77</sup> Wheaton v. Daily Telegr. Co. (1903), 124 Fed. 61.

<sup>78</sup> Gainey v. Gilson, 149 Ind. 58; Chandler v. Keith, 42 Iowa, 99.

<sup>79</sup> Mason v. New York Silk Manuf. Co., 27 Hun, 307; Jacobson v. Allen, 12 Fed. Rep. 454.

that act to creditors of the corporation to enforce their liabilities against the stockholders. This right is conferred only upon such creditors as are within the prescribed conditions, and for their personal benefit;<sup>80</sup> and in Illinois a receiver of "all the estate, property, and equitable interest" of an insolvent banking corporation created by that State, can not enforce against a stockholder in the corporation, the liability imposed by the statute of Illinois on each shareholder for double the amount of his stock, such liability being one in favor of creditors of the bank, and not in favor of the corporation.<sup>81</sup> Nor is any personal liability imposed on the stockholders of an insolvent trust company in a receiver's hands, by a charter provision that if at any time the capital stock paid into said corporation, shall be impaired by losses or otherwise, the directors shall forthwith repair the same by assessment."<sup>82</sup> Where the deed of trust of an insolvent corporation provides that the unpaid subscriptions shall be payable to the trustee, the right to collect them passes thereby, and they may be enforced in a suit for that purpose, brought by a creditor.<sup>83</sup> And a trust deed for the benefit of creditors, including "all the estate, property, rights, and credits," of the grantor, "of every kind and wherever situated," and "all moneys payable to the company, whether on calls or assessments on stock of the company or otherwise,"—passes the title to the unpaid subscriptions to the capital stock to said trustees, with power to collect and receive the same, when authoritatively called for, to the extent of the call made.<sup>84</sup> When unpaid subscriptions of stock, not called in, are assigned, in a general assignment for the benefit of creditors, a bill in equity by the assignee will be entertained, on behalf of all the creditors, to recover unpaid subscriptions.<sup>85</sup> But mere insolvency is never sufficient evidence of the surrender of corporate rights.<sup>86</sup> It has

<sup>80</sup> *Farnsworth v. Wood*, 91 N. Y. 308.

<sup>81</sup> *Jacobson v. Allen*, 20 Blatchf. C. Ct. 525.

<sup>82</sup> *Dewey v. St. Alban's Trust Co.* (1885), 57 Vt. 332.

<sup>83</sup> *Hamilton v. Glenn* (1889), 85 Va. 901, also holding that whether the right to collect the subscriptions passes by the deed of trust or not, the right of the corporation to them passes to creditors under Va. Code, ch. 57, § 23, which requires stockholders to pay their

subscriptions upon call by the president and directors, and provides that they may be recovered by action, warrant, or motion.

<sup>84</sup> *Lewis v. Glenn* (1888), 84 Va. 947.

<sup>85</sup> *Lionberger v. Broadway Savings Bank* (1882), 10 Mo. App. 499; "Rights of Receivers to Sue Stockholders for Unpaid Subscriptions," 29 Alb. L. J. 365.

<sup>86</sup> *Hall v. Lackmond* (1887), 50 Ark. 113, 6 Am. St. Rep. 84.

been said that the filing of a creditor's bill in equity against a corporation, is equivalent to a call for unpaid subscriptions;<sup>87</sup> and that since an assignee in bankruptcy succeeds to all the rights of the insolvent corporation, he has authority to make and to enforce payment of calls.<sup>88</sup> But in an action by a receiver, it is said that the only condition upon which a subscriber can be made liable to the corporation, is by regular calls made in pursuance of the charter.<sup>89</sup> An assignment for the benefit of creditors may be made by the directors of a corporation without the ratification of the stockholders, so as to confer (under a statutory provision making stockholders liable to creditors to the extent of their unpaid stock), on the assignee the right, by suit in equity, to compel payment from delinquent stockholders.<sup>90</sup> It has been held in New York, under the General Manufacturing Act of that State, that a receiver of an insolvent corporation has no rights against stockholders upon their personal liability as prescribed by the act, for the liability does not exist in favor of the corporation, nor of all the creditors, but only in favor of such creditors as are in a certain position.<sup>91</sup> But under special statutes in New York, trustees are vested with power to collect these claims on behalf of creditors.<sup>92</sup> A receiver has no greater rights with respect to calls upon delinquent stockholders than has the corporation; and where a stockholder has ceased to be a member of the corporation so that it can not make calls on the stock previously held by him, the receiver is in no better position.<sup>93</sup> The creditors—having the right to the exclusive control of the fund created for their benefit—may assign it *inter vivos*, or transmit it to their personal representatives.<sup>94</sup> So the receiver or assignee in bankruptcy of a foreign

<sup>87</sup> Hatch v. Dana, 101 U. S. 205.

<sup>88</sup> Hatch v. Dana, 101 U. S. 205.

<sup>89</sup> Mann v. Pentz, 3 N. Y. 415; Seymour v. Sturgess, 26 N. Y. 134.

<sup>90</sup> Chamberlain v. Bromberg (1888), 83 Ala. 576.

<sup>91</sup> Farnsworth v. Wood (1883), 91 N. Y. 308; Pfohl v. Simpson, 74 N. Y. 137; Weeks v. Love, 50 N. Y. 568; Mason v. New York Silk, etc. Co. (1882), 27 Hun, 307; Billings v. Trask (1883), 30 Hun, 314.

<sup>92</sup> Cuykendall v. Corning (1882), 88 N. Y. 129; Story v. Furman, 25 N. Y. 215; Walker v. Crain, 17 Barb. 128; Herkimer Co. Bank v.

Furman, 17 Barb. 116 Hurd v. Tallman, 60 Barb. 272.

<sup>93</sup> Billings v. Robinson (1884), 94 N. Y. 415; Farnsworth v. Wood (1883), 91 N. Y. 308; Cutting v. Damerel, 88 N. Y. 410; Cuykendall v. Corning, 88 N. Y. 129; Arenz v. Weir, 89 Ill. 25; Jacobson v. Allen, 20 Blatchf. 525; Hanson v. Donkersley, 37 Mich. 184.

<sup>94</sup> Pfohl v. Simpson, 74 N. Y. 137; Weeks v. Love, 50 N. Y. 568; Zabriskie v. Smith, 13 N. Y. 322; Wade v. Kalbfleish, 58 N. Y. 282; Jackson v. Daggett (1881), 24 Hun, 204.

corporation may maintain an action against a resident stockholder, if the corporation could have done so had the stockholder been a resident of the State in which the corporation is domiciled.<sup>95</sup> But to enable a receiver to sue at law for unpaid subscriptions, a call by the corporation or some competent court is first necessary.<sup>96</sup> And where a receiver has been appointed, a suit to compel the payment of subscriptions should be prosecuted in his name.<sup>97</sup> Suit by new receiver against directors, for loss by reason of failure to sue, were dismissed for laches of his predecessor who for ten years had failed to sue.<sup>98</sup>

**§ 1231. Suits against receiver. Execution or attachment may not issue against him.**—No substitution of the receiver as a party is necessary in an action pending against the corporation upon his appointment.<sup>1</sup> He may appeal the suit in the name of the corporation.<sup>2</sup> A foreign receiver, by leave of court, may come into a pending suit.<sup>3</sup> A receiver coming into a suit is bound by default of the corporation.<sup>4</sup> A receiver may intervene in a suit

<sup>95</sup> Dayton v. Borst, 31 N. Y. 435; Nathan v. Whitlock, 9 Paige, 152; Chandler v. Brown, 77 Ill. 333; Frank v. Morrison (1882), 58 Md. 423. Cf. Tinkham v. Borst (1860), 31 Barb. 407; McDonough v. Phelps (1856) 15 How. Prac. 372; Seymour v. Sturgess (1862), 26 N. Y. 134.

<sup>96</sup> Nathan v. Whitlock, 9 Paige, 152; Chandler v. Keith (1875), 42 Iowa, 99; Mills v. Scott, 99 U. S. 25; Cleveland v. Burnham (1885), 55 Wis. 598.

<sup>97</sup> Rankine v. Elliott, 16 N. Y. 377; Dane v. Young, 61 Me. 160; Hall v. United States Ins. Co., .5 Gill (Md.), 484; Hightower v. Thornton, 8 Ga. 486; *In re Birmingham*, etc. Ry. Co. (1881), 18 Ch. Div. 155. See also on this subject generally, Trustees of Louisiana Paper Co. v. Waples, 3 Woods, 34; Burlington, etc. R. Co. v. Boestler, 15 Iowa, 555; Penobscot, etc. R. Co. v. Dunn, 39 Me. 587; Philadelphia, etc. R. Co. v. Hickman (1857), 28 Pa. St. 318; Carlisle v. Cahawba, etc. R. Co. (1842), 4 Ala. 70; Coleman v. White, 14 Wis. 700; Umsted v. Buskirk, 17 Ohio

St. 113; Mann v. Pentz, 3 N. Y. 415; Hall v. United States Ins. Co. 5 Gill (Md.), 484; Freeman v. Winchester, 18 Miss. 577; Pentz v. Hawley, 1 Barb. Ch. 122; Sagory v. DuBois, 3 Sandf. Ch. 466; Gas Light & B. Co. v. Haynes, 7 La. Ann. 114; New Orleans Gas Light Co. v. Bennett, 6 La. Ann. 457; Starke v. Burke, 9 La. Ann. 341; Atwood v. Rhode Island Agric. Bank, 1 R. I. 376; Eppricht v. Nickerson (1884), 78 Mo. 482; Shockley v. Fisher (1882), 75 Mo. 498; Germantown, etc. Ry. Co. v. Fitler (1869), 60 Pa. St. 124; Wright v. McCormack, 17 Ohio St. 86, 95; Dutcher v. Marine National Bank, 12 Blatchf. 435.

<sup>98</sup> *Ex parte* Baker, 45 S. E. 143, 67 S. C. 74.

<sup>1</sup> United States Vinegar Co. v. Spanner (1894), 143 N. Y. 676; Kittridge v. Osgood (1894), 161 Mass. 384.

<sup>2</sup> People v. Troy, etc. Co. (1894), 82 Hun, 303.

<sup>3</sup> Rust v. United Waterworks Co. (1895), 70 Fed. 129.

<sup>4</sup> Perry v. Godbe (1897), 82 Fed. 141.

pending upon his appointment.<sup>5</sup> The court may enjoin a creditor's suit pending upon the appointment of receiver.<sup>6</sup> A suit pending in a federal court, is not affected by insolvency proceedings begun after bringing the suit.<sup>7</sup> A receiver of a national bank is not a necessary party to suit pending against the bank upon his appointment.<sup>8</sup> After appointment of receiver a creditor can not obtain a judgment that will be a prior lien.<sup>9</sup> After his appointment no new suit can be brought against the receiver, without leave of court.<sup>10</sup>

*Leave to sue.*—Exceptions to requirement of leave of court to bring suit, are:—suit against the receiver for trover,<sup>11</sup> suit in federal court for infringement of patent,<sup>12</sup> suit to set aside fraudulent assignment of stock by receiver.<sup>13</sup> The act of Congress provides that federal receivers may be sued in State or federal courts without first obtaining leave of court,<sup>14</sup> but garnishment proceedings are not suits, and will be enjoined by the federal courts.<sup>15</sup> Though permission was not obtained in suit against the receiver, the court has jurisdiction of it, and the receiver may waive the permission.<sup>16</sup> Where a creditor has recovered judgment against the receiver in another State than that of his appointment, he may there sue on the judgment.<sup>17</sup> Leave granted to sue the receiver will be to bring suit in the domestic court and not in a foreign court.<sup>18</sup>

*Execution or attachment against receiver.*—A judgment creditor can not have an execution issued after appointment of a re-

<sup>5</sup> Andrews v. Steele City Bank (1898), 57 Neb. 177, 77 N. W. 342.

<sup>6</sup> Morton v. Stone, etc. Co. (N. J. 1899), 44 Atl. 875.

<sup>7</sup> Straine v. Bradford, etc. Co. (1898), 88 Fed. 571.

<sup>8</sup> Speckert v. German Nat. Bank (1899), 98 Fed. 151.

<sup>9</sup> Clark v. Bacorn (1902), 116 Fed. 617.

<sup>10</sup> Burk v. Muskegon, etc. Co. (1894), 98 Mich. 614; Texas, etc. Ry. v. Cox (1892), 145 U. S. 593;

Werner v. Murphy (1894), 60 Fed. 769; Wayne Pike Co. v. State (1893), 134 Ind. 672; Earle v.

Humphrey (1899), 121 Mich. 518; Smith v. St. Louis, etc. Ry. (1899), 151 Mo. 391, 48 L. R. A. 368; Mont-

gomery v. Enslen (1900), 126 Ala. 654, 28 South. 626; Pierce v. Chisen (1899), 23 Ind. App. 505; Malott v. State (Ind. 1902), 64 N. E. 458.

Chisen (1899), 23 Ind. App. 505; Malott v. State (Ind. 1902), 64 N. E. 458.

<sup>11</sup> Kenney v. Ranney (1893), 90 Mich. 617.

<sup>12</sup> Hupfeld v. Automaton, etc. Co. (1895), 66 Fed. 788.

<sup>13</sup> Farwell v. Great Western T. Co. (1896), 161 Ill. 522.

<sup>14</sup> Ross v. Heckman (1897), 84 Fed. 6.

<sup>15</sup> Central Trust Co. v. East Tenn. etc. Ry. (1894), 59 Fed. 523.

<sup>16</sup> Mulcahey v. Strauss (1894), 151 Ill. 70.

<sup>17</sup> Thomas v. Hale (1901), 82 Minn. 423.

<sup>18</sup> Re Schuyler, etc. Co. (1894), 154 U. S. 256.

ceiver.<sup>19</sup> The receiver can not be garnisheed except by consent of the court.<sup>20</sup> By leave of court a creditor may levy an attachment upon the receiver on a debt due from him to a non-resident.<sup>21</sup> Appeal lies from an order of refusal to allow a suit against the receiver.<sup>22</sup> The court may enjoin suit in another court for the wrongful act of a receiver's predecessor.<sup>23</sup> Service of process may be made upon the receiver of a railroad instead of upon the statutory agent required to be appointed in each county through which the railroad runs, upon whom to serve process.<sup>24</sup> Service of process against a federal receiver may be made upon the local agent of the corporation.<sup>25</sup> Notwithstanding the receivership in case of a railroad, a mortgagee may bring a foreclosure suit on default in payment of interest becoming due after appointment of a receiver at the instance of a judgment creditor.<sup>26</sup> Where a federal receiver is in charge of a railroad, a mortgagee can not bring foreclosure proceedings in any court, but he may intervene.<sup>27</sup> The act of Congress permitting suits against the receiver without leave of court granted, does not apply in such a case.<sup>28</sup> A pledgee of stock, pledged by the corporation afterward coming in the hands of a receiver, must make him defendant to proceedings to foreclose the lien.<sup>29</sup> Although a receiver is in charge, a trust company as pledgee of first mortgaged bonds may sell them on notice, and although it is trustee of the first mortgage.<sup>30</sup> Without authority of court, the holder of a vendor's lien upon real estate of a corporation in charge of the receiver, can not sell the property.<sup>31</sup> Money deposited in a bank on the day when it is closed as insolvent, may be recovered from the receiver of the bank on the

<sup>19</sup> Fox v. Union, etc. Co. (1902), 37 N. Y. Misc. 308; Missouri, etc. Ry. v. Love (1900), 61 Kan. 433, 59 Pac. 1032.

<sup>20</sup> Citizens', etc. Bank v. Bay Circuit Judge (1896), 110 Mich. 633.

<sup>21</sup> Green v. Wallis Iron Works (1892), 49 N. J. Eq. 48.

<sup>22</sup> Meeker v. Sprague (1892), 5 Wash. St. 242, 31 Pac. 628.

<sup>23</sup> Jones v. Schlapback (1896), 81 Fed. 274.

<sup>24</sup> Stewart v. Harmon (1899), 98 Fed. 190.

<sup>25</sup> Wolfe v. Pierce (1900), 23 Ind. App. 591.

<sup>26</sup> Mercantile Trust Co. v. Balti-

more, etc. R. R. (1898), 89 Fed. 606.

<sup>27</sup> American, etc. Co. v. Central, etc. R. R. (1898), 84 Fed. 917; American Surety Co. v. Worcester, etc. Co. (1898), 90 Fed. 773.

<sup>28</sup> Minot v. Mastin (1899), 95 Fed. 734.

<sup>29</sup> Denny v. Cole (1900), 22 Wash. 372, 61 Pac. 38, 79 Am. St. Rep. 940.

<sup>30</sup> Guarantee Trust Co. v. Galveston City R. R. (1898) 87 Fed. 813.

<sup>31</sup> Pelletier v. Greenville, etc. Co. (1898), 123 N. C. 596, 31 S. E. 383, 68 Am. St. Rep. 821.

ground of fraud.<sup>32</sup> Claims of persons will be adjudicated in their Circuit of domicile.<sup>33</sup> Questions affecting the receiver will be tried in the court of primary jurisdiction where he was appointed.<sup>34</sup> When a receiver has possession of the corporate property, unsecured creditors seeking to reach it must apply to the court appointing him for leave to sue its receiver.<sup>35</sup> Although there may be a superior title, and that plainly appearing, the court must first be applied to for leave to sue.<sup>36</sup> For, to bring suit and to seek to reach the property in a receiver's hands without leave of the court appointing him, is considered to be a contempt of court, as an interference with the possession of its officer.<sup>37</sup> It rests in the discretion of the court to allow a party claiming rights against its receiver to bring an independent action against him, or to compel the party to proceed against him by petition in the action in which he is receiver.<sup>38</sup> It is usual, however, to grant permission to sue receivers, unless it appears clearly from the application of the claimant that his demand has no legal foundation.<sup>39</sup> For, as

<sup>32</sup> *Bosworth v. St. Louis, etc. Assn.* (1899), 174 U. S. 182.

<sup>33</sup> *Kirker v. Owens* (1899), 98 Fed. 499; *Fletcher v. Harney, etc. Co.* (1897), 34 Fed. 555.

<sup>34</sup> *Ames v. Union Pac. Ry.* (1897), 69 Conn. 709, 38 L. R. A. 804; *Cohen v. Gold Creek* (1899), 95 Fed. 580; *Wright v. McCormack*, 17 Ohio St. 86, 95; *Dutcher v. Marine Nat. Bank*, 12 Blatchf. 435, 8 Fed. Cas. 152.

<sup>35</sup> *Barton v. Barbour*, 104 U. S. 126; *Davis v. Gray*, 16 Wall. 203; *Reed v. Receivers of Richmond, etc. R. Co.* (1888), 84 Va. 231.

<sup>36</sup> *Moore v. Mercer, etc. Co.* (N. J. 1888), 4 Ry. & Corp. L. J. 563, citing *Noe v. Gibson*, 7 Paige, 513; *Angel v. Smith*, 9 Ves. 335; *Brooks v. Greathed*, 1 Jac. & W. 176; *Beach on Receivers*, §§ 213, 224, 225; 2 *Daniell Chancery Pr.* 1743, 1744.

<sup>37</sup> *Thompson v. Scott*, 4 Dill. 508; *Kennedy v. Indianapolis, C. & L. R. Co.*, 3 Fed. Rep. 97; *Parker v. Browning*, 8 Paige, 388, 35 Am. Dec. 717; *De Groot v. Jay*, 30 Barb. 483; *Taylor v. Baldwin*, 14 Abb. Pr. 166; *Miller v. Loeb*, 64 Barb. 454; *Little v. Dusenberry*, 46 N.

J. 614, 50 Am. Rep. 445; *Angell v. Smith*, 9 Ves. 335; *Brooks v. Greathed*, 1 Jac. & W. 176; *Randfield v. Randfield*, 3 De G., F. & J. 766, reversing 1 Dr. & Sm. 310; *Searle v. Choate*, 25 Ch. Div. 723; *Tink v. Rundle*, 10 Beav. 318; *Evelyn v. Lewis*, 3 Hare, 472; *In re Persee*, 8 Ir. Eq. 111; *Parr v. Bell*, 9 Ir. Eq. 55; *Andrews v. Stanton*, 18 Bradw. 163, 165; *Melendy v. Barbour*, 78 Va. 544; *Rogers v. Mobile & Ohio R. Co.* (Tenn. 1883), 16 Rep. 536; *Grafenreid v. Brunswick & A. R. Co.*, 57 Ga. 22; *Henderson v. Walker*, 55 Ga. 481; *Wray v. Hazlett*, 6 Phila. 155; *Keen v. Breckenridge*, 96 Ind. 69; *Meredith, etc. Sav. Bank v. Simpson*, 22 Kan. 414; *Payne v. Baxter*, 2 Tenn. Ch. 517; *Heath v. Missouri, K. & T. R. Co.*, 83 Mo. 617, 623.

<sup>38</sup> *Central Trust Co. v. Wabash, St. Louis, etc. Co.*, 23 Fed. Rep. 858; *Kennedy v. Indianapolis, C. & L. R. Co.*, 3 Fed. Rep. 97; *Melendy v. Barbour*, 78 Va. 544; *Beach on Receivers*, § 654.

<sup>39</sup> The petition should, therefore, show a probable cause of action—one demanding adjudication

has been aptly said, receivers are not appointed "for the purpose of keeping persons out of their rights."<sup>40</sup> But a court is reluctant to grant permission to sue its receiver in other forums,<sup>41</sup> especially where the questions to be determined are closely connected with those in the original action wherein he was appointed.<sup>42</sup> Accordingly, it is only when special facts and circumstances are shown to exist, that the court will allow suit to be brought in another court.<sup>43</sup> But so long as the receiver's possession is not disturbed or questioned, parties may litigate, in the same court or elsewhere, questions concerning the ultimate right and title to the property.<sup>44</sup>

**§ 1232. Receivers' powers over rolling-stock and leaseholds of railroads.**—For operation of a railroad in the hands of a receiver, the court may authorize him to purchase or rent necessary rolling-stock.<sup>45</sup> The receiver taking possession of a leased line of railroad, may operate it and take reasonable time to determine whether or not to assume the lease, meanwhile paying

by proceedings in court. *Jordan v. Wells*, 3 Woods, 527; *Randfield v. Randfield*, 3 De G., F. & J. 766; *Hills v. Parker*, 111 Mass. 508, 15 Am. Rep. 63.

<sup>40</sup> *Eyton v. Denbigh, etc. Ry. Co.*, L. R. 6 Eq. 488. Although in this same case, after the railroad company had, by deed, conveyed their superfluous land and chattels in trust for the benefit of creditors, the court refused to allow distraint either upon the property so conveyed or upon the locomotives used in the operation of the road.

<sup>41</sup> *In re Mallory*, 2 N. Y. Supp. 570; *In re Platt*, 52 How. Pr. 468; *Meredith Village Sav. Bank v. Simpson*, 22 Kan. 414; *Piper v. Stratten* (Tex. 1888), 75 W. Rep. 45.

<sup>42</sup> *Central Trust Co. v. Wabash, etc. R. Co.*, 23 Fed. Rep. 858, holding that the parties should intervene.

<sup>43</sup> *In re Platt*, 52 How. Pr. 468; *Meredith Village Savings Bank v. Simpson*, 22 Kan. 414.

<sup>44</sup> *Holliday's Case*, 27 Fed. Rep. 830, 843. For a receiver is not disturbed in his possession by other

courts acting after his appointment. *Blake v. Alabama & C. R. Co.*, 6 Nat. Bank Reg. 331; *Keep v. Michigan L. S. R. Co.*, 6 Chicago Leg. News, 101; *Sedgwick v. Menck*, 6 Blatchf. 156; *Alden v. Boston, H. & E. R. Co.*, 5 Bankr. Reg. 230; *Bill v. New Albany R. Co.*, 2 Biss. 390; *Union Trust Co. v. Rockford, R. I. & St. L. R. Co.*, 7 Chicago Leg. News, 33; *Storm v. Waddell*, 2 Sandf. Ch. 494; *Hutchinson v. Green*, 6 Fed. Rep. 833; *Spinning v. Ohio L. Ins. & Trust Co.*, 2 Disney, 336; *May v. Printup*, 59 Ga. 129; *Eisenmann v. Thill*, 1 Cin. Super. Ct. Rep. 188; *Beecher v. Bininger*, 7 Blatchf. 170; *In re Clark & Bininger*, 4 Benedict, 88; *Conklin v. Butler*, 4 Biss. 22; *Mercantile Trust Co. v. Lamoille Valley R. Co.*, 16 Blatchf. 324; *Beach on Receivers*, § 20.

<sup>45</sup> *Platt v. Philadelphia, etc. R. R.* (1898), 84 Fed. 533; *Central Trust Co. v. Wabash, etc. Ry.* (1891), 46 Fed. 156; *Central Trust Co. v. Marietta, etc. R. R.* (1891), 48 Fed. 32; *Sunflower Oil Co. v. Wilson* (1892), 142 U. S. 313.

rent for the time he actually holds the leased property.<sup>46</sup> Against rents accruing during the receivership, he can not set-off pre-existing claims against the lessor.<sup>47</sup> Rent accrued upon a leased road before the receivership is not a secured liability.<sup>48</sup> If a railroad lease also provides for purchase and the receiver continues the lease, he is bound by the provisions.<sup>49</sup> Net loss in operating the road while the receiver is considering whether or not to continue the lease, is not chargeable upon mortgaged property in his hands.<sup>50</sup> The estate in the receiver's hands is liable for rent accruing during his continuance of the lease.<sup>51</sup> Where in an agreement of lease thirty per cent of gross earnings are made payable to lessors' bondholders, they may collect it from lessee's receiver.<sup>52</sup> The receiver is bound by the lessors' agreement to pay taxes on the leased road.<sup>53</sup> Where by consent of the court the receiver assumes a lease, the rent will be paid, and if necessary will be paid out of the corpus of the estate.<sup>54</sup> The contract of a purchaser of stock with the seller, that he shall be employed for a period of two years by the corporation, is enforceable against the purchaser, although in the meantime, the corporation goes into possession of a receiver.<sup>55</sup> A receiver has no power to assume a contract of the corporation to retain an injured employe in the company's employment.<sup>56</sup> The receiver cannot set-off repairs of cars made while using them, against rent due upon lease of them to the company.<sup>57</sup> Where the lease reserves a lien, it will hold against the receiver, for rent accrued during his possession of the leased property.<sup>58</sup> A receiver is liable to pay the royalties

<sup>46</sup> Dayton, etc. Co. v. Felsenthal (1902), 116 Fed. 961; Bell v. American, etc. League (1895), 163 Mass. 558, 28 L. R. A. 452, 47 Am. St. Rep. 481; New York, Pa. etc. R. R. v. New York, etc. R. R. (1893), 58 Fed. 268; Quincy R. R. v. Humphrey's (1892), 145 U. S. 82.

<sup>47</sup> Farmers' L. & T. Co. v. Northern Pac. R. R. (1893), 58 Fed. 257.

<sup>48</sup> Central Trust Co. v. Charlotte, etc. R. R. (1895), 65 Fed. 264; New York Pa. etc. R. R. v. N. Y. & L. E. etc. R. R. (1893), 58 Fed. 268.

<sup>49</sup> Mercantile Trust Co. v. Atlantic, etc. R. R. (1897), 80 Fed. 18.

<sup>50</sup> Mercantile Trust Co. v. Farm-

ers' L. & T. Co. (1897), 81 Fed. 254.

<sup>51</sup> Mercantile Trust Co. v. Southern, etc. Co. (1897), 113 Ala. 543, 21 South. 373.

<sup>52</sup> Terre Haute, etc. R. R. v. Cox (1900), 102 Fed. 825.

<sup>53</sup> United States Trust Co. v. Mercantile Trust Co. (1898), 88 Fed. 140.

<sup>54</sup> Central Trust v. Continental Trust Co. (1898), 86 Fed. 517.

<sup>55</sup> Kinsman v. Fisk (1899), 37 N. Y. App. Div. 443.

<sup>56</sup> Whightsel v. Felton (1899), 95 Fed. 923.

<sup>57</sup> Central Trust Co. v. Wabash, etc. Ry. (1892), 50 Fed. 857.

<sup>58</sup> Lane v. Washington Hotel Co.

assumed to be paid by the corporation before he can sell the articles patented.<sup>60</sup>

**§ 1233. Operating expenses; priority in payment.**—Before any income can be paid to bondholders, there must be paid all expenses incident to the operation of the road, and damages occurring during its operation in the hands of the receiver.<sup>61</sup> Damages for personal injuries suffered in the operation of a railroad by a receiver, are part of the operating expenses, payable prior to any payment to bondholders, and payable if necessary out of the corpus of the estate.<sup>62</sup> Where the receiver is appointed at the instance of shareholders, or general creditors, indebtedness incurred by the receiver is not entitled to priority in payment over that of a mortgage.<sup>63</sup> Material men are entitled to reimbursement from the bondholders, where earnings are applied by the receiver to payment for permanent improvements.<sup>64</sup> A judgment against the corporation for injuries to persons not employed by it, resulting from negligence of employes, is not to be classed among operating expenses and has no priority right of payment over mortgage debts from the earnings of a receivership, or from proceeds of property subject to the mortgage.<sup>65</sup> A pending suit in the name of a corporation, does not abate upon appointment of a receiver except upon dissolution.<sup>66</sup>

**§ 1234. Receiver's certificates. Authority to issue.**—Receiver's certificates, frequently issued by receivers of railway corporations to meet the current expenses of maintaining the railway as a going concern, and constituting a lien upon the income of the road, superior even to mortgage bonds and coupons, may be ap-

(1899), 190 Pa. St. 230; Link, etc. Co. v. Hughes (1898), 174 Ill. 155.

<sup>59</sup> People v. Remington (1891), 59 Hun, 282.

<sup>60</sup> Cobb v. Sweet (1899), 46 N. Y. App. Div. 375; Grand Trunk Ry. v. Central Vt. R. R. (1898), 88 Fed. 636; Durkee v. National Bank, etc. (1900), 102 Fed. 845; First National Bank v. Ewing (1900), 103 Fed. 163.

<sup>61</sup> South Carolina, etc. R. R. v. Carolina, etc. Ry. (1899), 93 Fed. 543; Thomas v. East Tenn. etc. Ry. (1894), 60 Fed. 7; Cross v. Evans (1898), 86 Fed. 1; Kneeland v. Foundry, etc. Works (1891), 140 U. S. 592; Anderson v. Condict (1899), 93 Fed. 349;

Ruhlender v. Chesapeake, etc. R. R. (1898), 91 Fed. 5; Reinhart v. Augusta, etc. Co. (1899), 94 Fed. 901.

<sup>62</sup> Seiler v. Union, etc. Co. (1901), 50 W. Va. 208, 40 S. E. 547; United States, etc. Corp. v. Portland Hospital (1902), 40 Oreg. 523, 64 Pac. 644, 67 Pac. 194, 56 L. R. A. 627; Central Trust Co. v. Wabash, etc. Ry. (1891), 46 Fed. 26.

<sup>63</sup> Finance Co. v. Charleston, etc. R. R. (1892), 52 Fed. 524.

<sup>64</sup> Atl. T. Co. v. Dana (Kan. 1903), 128 Fed. 209 (U. S. C. C. A.).

<sup>65</sup> Rooney v. Southern, etc. Assn. (Ga. 1904), 47 S. E. 345.

propriately mentioned in this connection. They are not, strictly speaking, corporate obligations, although the property of the company in the receiver's hands is pledged to their payment.<sup>66</sup> While they are to that extent somewhat of the nature of corporate bonds, they differ from commercial paper in that they are acknowledgments of indebtedness rather than promises to pay. The fund upon which they are drawn is usually uncertain, and there is no one personally liable for their payment. The fund in the receiver's hands is alone bound for their redemption, and their payment can be compelled only by an application to the court by whose authority they were issued.<sup>67</sup> It is, therefore, the ordinary rule that they are not negotiable instruments.<sup>68</sup> And the assignor, or indorser, is not liable as a guarantor or indorser of commercial paper; nor does the assignment of them import a warranty that they are collectible, or that they will be paid.<sup>69</sup> It has been said that if they have been issued below par the holder can recover no more than was paid for them,<sup>70</sup> whether he be the original payee or a transferee.<sup>71</sup> On the other hand, however, there is authority for believing that where the court has authorized their issue be-

<sup>66</sup> Meyer v. Johnson, 53 Ala. 349; Turner v. Peoria & Springfield R. Co., 95 Ill. 134, 35 Am. Rep. 144, holding that if the fund be insufficient, it is to be divided proportionally among the holders.

<sup>67</sup> Beach on Receivers, § 401; Wallace v. Loomis, 97 U. S. 146, 162; Miltenberger v. Logansport R. Co., 106 U. S. 286, 309; Union Trust Co. v. Illinois Midland Ry. Co. 117 U. S. 434, 454; Turner v. Peoria, etc. R. Co., 95 Ill. 134, 35 Am. Rep. 144.

<sup>68</sup> Beach on Railroads, § 758; Husband v. Eppling, 81 Ill. 172, 25 Am. Rep. 273; Baird v. Underwood, 74 Ill. 176; Turner v. Peoria, etc. R. Co., 95 Ill. 134, 35 Am. Rep. 144; Bank of Montreal v. Chicago, etc. R. Co., 48 Iowa, 518; Union Trust Co. v. Chicago, etc. R. Co., 7 Fed. Rep. 513; McCurdy v. Bowes, 88 Ind. 583; Stanton v. Alabama, etc. R. Co., 2 Woods, 506; Newbold v. Peoria, etc. R. Co., 5 Bradw. 367; Central National Bank of Boston v. Hazard, 49 Fed. 293, 1 Ry. & Corp. L. J. 347. Cf. West v. Foreman, 21

Ala. 400; Corbett v. State, 24 Ga. 287; Harriman v. Sanborn, 43 Me. 128; Railroad Co. v. Howard, 7 Wall. 392, 415; Mechanics' Bank v. New York, etc. R. Co., 13 N. Y. 599; Voshell v. Hynson, 26 Md. 83; Union Trust Co. v. Soutter, 107 U. S. 591; Fosdick v. Schall, 99 U. S. 235; Fosdick v. Car Co., 99 U. S. 256; Bright v. North, 2 Phila. 216; Beach on Receivers, § 398. On their face they refer to the particular power thus conferred, and to the particular case then pending in th court. This is sufficient notice to put a prudent dealer on inquiry. Master's Report referred to in Stanton v. Alabama, etc. R. Co., 2 Woods, 506, 512, citing *In re Magdalena Steam Navigation Co.*, Johns. Eng. Ch. 690.

<sup>69</sup> McCurdy v. Rowes, 88 Ind. 583; Beach on Receivers, § 396.

<sup>70</sup> Swan v. Clark, 110 U. S. 602. Cf. Union Trust Co. v. Chicago & Lake Huron R. Co. 7 Fed. Rep. 513

<sup>71</sup> Stanton v. Alabama, etc. R. Co., 2 Woods, 506.

low par and the discount has not been unreasonable, the holder may recover their full face-value with interest.<sup>72</sup> A receiver of a railroad, yielding no surplus income, can not be authorized to issue certificates as prior lien on the property to pay interest on first mortgage bonds, to prevent their falling due, if the trustee and majority of the bondholders object.<sup>73</sup> Unless by order of the court, the receiver has no power to issue certificates for debt, to have priority over a mortgage.<sup>74</sup> A contractor has no priority right over receiver's certificates secured by mortgage on the corporate property.<sup>75</sup> Where a railroad is sold in foreclosure by the receiver, the new company must accept his certificates made receivable in payment for freight.<sup>76</sup> His certificates may be made payable out of the proceeds of sale in foreclosure.<sup>77</sup> Receiver's certificates are a valid lien upon the property sold, if sold subject to claims, although not presented until long afterward. If the road is sold free from debts or certificates of the receiver, the lien therefor, attaches to the proceeds of the sale.<sup>78</sup> The court may authorize the receiver to buy rolling-stock, and issue his certificates in payment therefor.<sup>79</sup> A mechanic's lien may have priority over receiver's certificates.<sup>80</sup> The receiver may pay a debt of the company where its non-payment would endanger loss of the corporate property.<sup>81</sup> For service rendered prior to the receivership, he can not assume obligation to pay.<sup>82</sup> It is sometimes the case that the entire estate is consumed in the payment of the debts and certificates of receivers, leaving nothing for the bondholders, or other lien-holders.<sup>83</sup> The court will require consent of the bondholders to the issue of receiver's certificates unless for claims

<sup>72</sup> Union Trust Co. v. Illinois Midland Ry. Co., 117 U. S. 434, cited in Beach on Railways, 758, where the subject is more fully discussed.

<sup>73</sup> Townsend v. Oneonta, etc. R. Co. (1903), 84 N. Y. S. 427.

<sup>74</sup> Ludington v. Thompson (1896), 4 N. Y. App. Div. 117; Wesson v. Chapman (1894), 77 Hun, 144.

<sup>75</sup> Postal, etc. Co. v. Vane (1897), 80 Fed. 961.

<sup>76</sup> Evansville, etc. R. R. v. Frank (1901), 3 Ind. App. 96.

<sup>77</sup> Finance Co. v. Charleston, etc. R. R. (1894), 62 Fed. 205.

<sup>78</sup> Mercantile Trust Co. v. Kanawha (1892), 50 Fed. 877; Wesson v. Chapman (1894), 76 Hun, 592.

<sup>79</sup> Central Trust Co. v. Tappan (1889), 6 N. Y. Supp. 918.

<sup>80</sup> Stewart, etc. Co. v. Missouri Pac. Ry. Co. (1889), 28 Neb. 39.

<sup>81</sup> Mercantile Trust Co. v. Baltimore, etc. R. R. (1897), 82 Fed. 360; McKittrick v. Ark. Central Ry. (1894), 152 U. S. 578.

<sup>82</sup> Platt v. Philadelphia, etc. R. R. (1902), 115 Fed. 842.

<sup>83</sup> Royal Trust Co. v. Washburn, etc. Ry. (1902), 120 Fed. 11; Kent v. Lake Superior, etc. Co. (1892), 144 U. S. 75.

pre-existing the mortgage.<sup>84</sup> Receiver's certificates, issued by a State court to a judgment creditor in a suit to which the mortgage was not made a party, will not bind the federal court in its decree for foreclosure.<sup>85</sup> Where the mortgage is foreclosed, and the time for redemption from sale is expired, receiver's certificates have no priority over the mortgage.<sup>86</sup> Receiver's certificates issued for construction of a bridge, or for rolling-stock at instance of a third mortgagee, in foreclosure suit, may have priority over the antecedent mortgages upon their subsequent foreclosure.<sup>87</sup> Where the suit in foreclosure is independent of the receivership, certificates for improvements will not be authorized to be issued, by a receiver appointed on suit of the stockholders.<sup>88</sup> Certificates of a receiver, appointed in New York to wind up the corporation, will not be recognized in Texas, upon the foreclosure of a mortgage on property in Texas.<sup>89</sup> One class of receiver's certificates may have priority over another, according to their terms, as, where certificates are issued in taking up outstanding bonds.<sup>90</sup> Receiver's certificates, generally have no priority over other debts of receiver,—an exception is a certificate given for taxes.<sup>91</sup> A receiver can not issue certificates for working coal-mines against objection of mortgagees.<sup>92</sup>

**§ 1235. Transfer of the corporate property to receivers. Vesting of title; Possession of property by the receiver.**—Although the statute may make void, as against the receiver, any transfer of property made pending dissolution proceedings, such provision does not void a judgment by default against the corporation.<sup>93</sup> On appointment of a receiver for an insolvent corporation, the right of possession of the property passes to him by operation of law.<sup>94</sup> The court will enjoin interference with the

<sup>84</sup> Farmers', etc. Co. v. Centralia R. R. (1899), 96 Fed. 636.

<sup>85</sup> Metropolitan Trust Co. v. Lake Cities, etc. Ry. (1900), 100 Fed. 897.

<sup>86</sup> Standley v. Henrie, etc. Co. (1900), 27 Colo. 331, 61 Pac. 600.

<sup>87</sup> Central Trust Co. v. Marietta, etc. R. R. (1896), 75 Fed. 193.

<sup>88</sup> Street v. Maryland Central Ry. (1893), 59 Fed. 25.

<sup>89</sup> Pool v. Farmers', etc. Co. (1894), 7 Tex. Civ. App. 334.

<sup>90</sup> Bank of Commerce v. Cen-

tral, etc. Co. (1902), 115 Fed. 878; Bibber-White Co. v. White River, etc. R. R. (1902), 115 Fed. 786.

<sup>91</sup> First Nat. Bank v. Ewing (1900), 103 Fed. 168; Lewis v. Linden, etc. Co. (1897), 183 Pa. St. 248.

<sup>92</sup> Farmers' L. & T. Co. v. Grape, etc. Co. (1892), 50 Fed. 481.

<sup>93</sup> *In re Muehlfeld*, etc. Co., 12 App. Div. (N. Y.) 492.

<sup>94</sup> Brynjolson v. Osthus (N. D. 1903), 96 N. W. 261.

possession of property belonging to the receiver.<sup>95</sup> In equity the corporate assets vest in the receiver from time of his appointment,—it renders invalid any transfer of them by the corporation thereafter,<sup>96</sup> but the corporate real estate does not vest in him, until conveyance to him by the corporation,<sup>97</sup> unless the statute otherwise provides, as in New York, etc.<sup>98</sup> The appointment of receiver does not carry title to property of the corporation beyond the State.<sup>99</sup> Judgment and execution prior to the receivership, have priority of lien.<sup>1</sup> A receiver in a foreclosure suit can take no property of the corporation which is not covered by the mortgage.<sup>2</sup> The statute generally vests in the receiver full title to the corporate property, to the extent of its ownership by the corporation,<sup>3</sup> with power under the direction of the court to sell and convey such property for payment of corporate debts, or for distribution among the shareholders,<sup>4</sup> and with authority to collect debts due the corporation, and to enforce by action all rights of the corporation, to every extent it might have done during its existence.<sup>5</sup> And, if so authorized by statute, the receiver may sue, for the benefit of corporate creditors, to enforce statutory liability of the corporate shareholders.<sup>6</sup> On appointment of a receiver for an insolvent bank, all title passes to him in notes secured by mortgage to the bank.<sup>7</sup> Where an insolvent corporation, at the time of the appointment of the receiver, owes the bank in amount exceeding the amount of the corporation's deposits in the

<sup>95</sup> Virginia, etc. Co. v. Bristol Land Co. (1898), 88 Fed. 134; Lake Shore, etc. Ry. v. Felton (1900), 103 Fed. 227.

<sup>96</sup> Linville v. Hadden (1898), 88 Md. 594, 43 L. R. A. 222.

<sup>97</sup> St. Louis, etc. Co. v. Sandoval, etc. Co. (1884), 111 Ill. 32.

<sup>98</sup> *Re Schuyler's, etc. Co.* (1892), 64 Hun, 384; Mutual Brewing Co. v. New York, etc. Co. (1897), 16 N. Y. App. Div. 149; Prentiss, etc. Co. v. Whitman, etc. Co. (1898), 88 Md. 240; Savings, etc. Co. v. Bear Valley, etc. Co. (1899), 93 Fed. 339.

<sup>99</sup> Hammond v. National, etc. Assn. (1901), 58 N. Y. App. Div. 453.

<sup>1</sup> *In re Lewis, etc. Co.* (1895), 89 Hun, 208; Wheeler v. Walton, etc. Co. (1895), 65 Fed. 720; Ellis

v. Vernon, etc. Co. (1893), 86 Tex 109; State v. Chehalis, etc. (1894), 8 Wash. 210, 35 Pac. 1087, 25 L. R. A. 354; Moore v. Southern, etc. Co. (1896), 83 Fed. 399.

<sup>2</sup> Alabama National Bank v. Mary Lee, etc. Co. (1896), 108 Ala. 288, 19 South. 404; Central T. Co. v. Worcester, etc. Co. (1902), 114 Fed. 659; Platt v. N. Y. R. R. (1901), 63 N. Y. App. Div. 401.

<sup>3</sup> American Nat. Bank, etc. v. Nat. etc. Co., 70 Fed. 420.

<sup>4</sup> St. Louis, etc. Co. v. Sandoval, etc. Co., 111 Ill. 32.

<sup>5</sup> Lum v. Robertson, 6 Wall. (U. S.) 277; French v. Landis, 12 Rob. (La.) 633.

<sup>6</sup> Walker v. Crain, 17 Barb. (N. Y.) 119.

<sup>7</sup> Brynjolfson v. Osthus (N. D. 1903), 96 N. W. 261.

bank, it is entitled as against them to set-off its debt due from the corporation.<sup>8</sup> A receiver takes the property subject to all valid prior liens.<sup>9</sup>

**§ 1236. Sales by receiver. Distribution of the proceeds of sale.**—A stockholder may intervene to stop a receiver's reckless sale of the property, where the corporation fails to protect the stockholders' interest.<sup>10</sup> The court will set aside a private sale made by the receiver, without leave of court, and for an inadequate price.<sup>11</sup> Where a commissioner makes sale to a bank wherein he is a stockholder and director, the court will set the sale aside, regardless of the price, or fairness of the transaction.<sup>12</sup> The court will confirm a receiver's sale though private, and though before confirmation a higher bid is offered, if no fraud or mistake is charged.<sup>13</sup> A receiver's sale of the assets of an insolvent corporation can not be collaterally attacked.<sup>14</sup> Creditor's dues for operating expense of a railroad, sold in foreclosure of its mortgage, are not entitled to preference from the proceeds of the corpus of the property, when the money obtained on the mortgage notes was used in paying current expenses.<sup>15</sup> A question between pledgor and pledgee of bonds, can not be entertained by the court, until after decree in foreclosure upon distribution of the proceeds of sale.<sup>16</sup> Citizens of other States are entitled to equal rights with resident citizens, in distribution of the property of an insolvent corporation.<sup>17</sup> In case of a mortgaged railroad running into two or more States, its assets being a lease and rolling-stock, and there being preferred liens, the distribution of proceeds of sale of the assets may be according to mileage in the several States.<sup>18</sup> General creditor's share with judgment creditors upon distribution.<sup>19</sup> Debts incurred by the corporation after appointment of the receiver, do not share in the distribution of the assets.<sup>20</sup> Stock-

<sup>8</sup> *Wheaton v. Daily T. Co.* (1903), 124 Fed. 61.

<sup>9</sup> *Smith v. Sioux, etc. Co.* (1899), 109 Iowa, 51, 79 N. W. 457.

<sup>10</sup> *State v. Holmes* (1900), 60 Neb. 39, 82 N. W. 109.

<sup>11</sup> *South Baltimore, etc. Co. v. Kirby* (1899), 89 Md. 52.

<sup>12</sup> *McCullough, etc. Co. v. National Bank* (1900), 111 Ga. 132, 36 S. E. 465.

<sup>13</sup> *Rogers v. Rogers, etc. Co.* (1901), 62 N. J. Eq. 111.

<sup>14</sup> *Anderson v. Chicago, etc. T. Co.* (1898), 101 Wis. 385.

<sup>15</sup> *Gregg v. Metropolitan T. Co.* (1903), 124 Fed. 721.

<sup>16</sup> *Sioux City v. Manhattan T. Co.* (1899), 92 Fed. 428.

<sup>17</sup> *Blake v. McClung* (1900), 176 U. S. 50.

<sup>18</sup> *Thomas v. Cincinnati, etc. Ry.* (1898), 91 Fed. 195.

<sup>19</sup> *In re Lord, etc. Co.* (1895), 7 Del. Ch. Rep. 248.

<sup>20</sup> *Jones v. Arena Publishing Co.* (1898), 171 Mass. 22.

holders, owning bonds, will not be paid out of the proceeds of foreclosure, until after the payment of the other bondholders.<sup>21</sup> As against the property of a dissolved corporation, the statute of limitation does not run.<sup>22</sup>

**§ 1237. Liability of receivers.**—“Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences, and liabilities are official and not personal, and judgments against him as receiver, are payable only from the funds in his hands.”<sup>23</sup> He is an agent of the court, and not personally liable for debts regularly incurred by him as receiver.<sup>24</sup> But he is personally liable for continuing to operate the property at a loss, without express leave of the court;<sup>25</sup> or for disposing of property, leaving debts unpaid.<sup>26</sup> He is personally liable upon his own notes issued in purchase of material, whether or not by order of court;<sup>27</sup> and for loss of money deposited, without authority, in a bank which failed;<sup>28</sup> and for failure to collect assessments, collectible but lost by his own negligence.<sup>29</sup> The circumstances must determine whether the receiver assumed personal liability for a debt incurred by him.<sup>30</sup> The receiver is not obliged to carry out executory contracts, but upon adoption by the receiver, of a pre-existing contract, the contractor becomes entitled to sums, subsequently becoming due, and they are to be paid as expenses of the receivership.<sup>31</sup> The receiver may be authorized to carry out

<sup>21</sup> Shaw v. Saranac (1894), 78 Hun, 7.

<sup>22</sup> Ludington v. Thompson (1897), 153 N. Y. 499.

<sup>23</sup> Texas, etc. Ry. v. Cox (1892), 145 U. S. 593; McNulta v. Lochbridge (1891), 141 U. S. 327.

<sup>24</sup> *In re* Home Assn. (1891), 129 N. Y. 288; Platt v. New York, etc. Ry. (1902), 170 N. Y. 451; *In re* Sewickley, etc. Co. (Pa. 1901), 47 Atl. 944; Olpherts v. Smith (1900), 54 N. Y. App. Div. 514; Fallon v. Egberts, etc. Co. (1900), 56 N. Y. App. Div. 585; Schmidt v. Gayner (1895), 59 Minn. 303, 62 N. W. 265; Eddy v. Powell (1892), 49 Fed. 814; Sager v. Smith (1899), 45 N. Y. App. Div. 358.

<sup>25</sup> State, etc. Bank v. Fanning, etc. Co. (Iowa, 1902), 92 N. W.

712; Gillespie v. Blair Glass Co. (1899), 189 Pa. St. 50.

<sup>26</sup> Kirker v. Owings (1899), 98 Fed. 499.

<sup>27</sup> Peoria, etc. v. Hickey (1900), 110 Iowa, 276, 86 N. W. 475, 80 Am. St. Rep. 296.

<sup>28</sup> Fikener v. Bott (Ky. 1898), 47 S. W. 251.

<sup>29</sup> *In re* Angell (Mich. 1902), 91 N. W. 611.

<sup>30</sup> Cake v. Mohun (1896), 164 U. S. 311; Prouty v. Prouty, etc. Co. (893), 155 Pa. St. 112.

<sup>31</sup> Scott v. Rainer, etc. Ry. (1895), 13 Wash. 108, 42 Pac. 531; Ames v. Union Pac. Ry. (1894), 60 Fed. 966; Central Trust Co. v. East Tenn. etc. Co. (1897), 79 Fed. 19; *Re* Seattle, etc. Ry. (1894), 61 Fed. 541; Carswell v.

pre-existing contracts, even after dissolution of the corporation.<sup>32</sup> A receiver, operating a railroad, sustains toward the public the relation of common carrier; and as receiver will be amenable to the common-law courts, in actions for negligence,<sup>33</sup> to the extent of the funds of the receivership, but he is not personally liable, and ceases to be officially liable, after he has turned over such funds to the purchasers, and received his discharge.<sup>34</sup> The corporation itself will not be liable for injuries received on its road, after the road has passed under the control of a receiver duly appointed, and taking charge.<sup>35</sup>

**§ 1238. Liability, as receiver, for torts of the corporation.**—The receiver, as receiver, but not personally, is liable for torts committed during his own or his predecessor's receivership.<sup>36</sup> The corporation itself is not liable for accidents, or negligence or damages occurring while the receiver is in control;<sup>37</sup> but is liable therefor, upon discharge of the receiver, and return of the estate to the corporation.<sup>38</sup> The corporation is liable for torts, where during the receivership the revenue is used for improvements, and afterwards the property is restored to the corporation.<sup>39</sup>

**§ 1239. Foreign receivers.**—Where a receiver in Kentucky was appointed under a mortgage including rolling-stock, an Ohio

Farmers' L. T. Co. (1896), 74  
Fed. 88.

<sup>32</sup> Florence, Gas etc. Co. v. Hanby (1893), 101 Ala. 15, 13 South. 343; Seibert v. Minneapolis, etc. Ry. (1894), 58 Minn. 53, 20 L. R. A. 535, 38 Am. St. Rep. 530; Philadelphia, etc. Co. v. Daube (1896), 71 Fed. Rep. 583.

<sup>33</sup> Wall v. Platt, 169 Mass. 398; Burke v. Ellis, 105 Tenn. 702; Hopkins v. Taylor, 87 Ill. 436.

<sup>34</sup> Archambeau v. Platt, 173 Mass. 249; Ryan v. Hayes, 62 Tex. 42.

<sup>35</sup> State v. Wabash Ry. Co., 115 Ind. 466; Locke v. Turnpike Co., 100 Tenn. 163; Texas Pac. Ry. Co. v. Huffman, 83 Tex. 286.

<sup>36</sup> McNulta v. Lockridge (1891), 137 Ill. 270, 31 Am. St. Rep. 362.

<sup>37</sup> Chamberlain v. New York, etc. R. R. (1895), 71 Fed. 636; Memphis, etc. R. R. v. Hoehner (1895), 67 Fed. 456; Gibson v.

Hamilton, etc. Co. (1900), 21 Wash. 362; Missouri, etc. Ry. v. Wood (Tex. 1899), 52 S. W. Rep. 93; Texas, etc. Ry. v. Bledsoe (1893), 2 Tex. Civ. App. 88, 20 S. W. 1135.

<sup>38</sup> Tex. Pac. Ry. v. Bloom (1897), 164 U. S. 636; Tex. etc. Ry. v. Boyd (1893), 6 Tex. Civ. App. 205, 24 S. W. 1086; Bloomfield R. R. v. Van Slike (1886), 107 Ind. 480; International, etc. R. R. v. Cook (1897), 16 Tex. Civ. App. 386, 41 S. W. 665; Tex. etc. Ry. v. Donovan (1894), 86 Tex. 378, 25 S. W. 10.

<sup>39</sup> Tex. Pac. Ry. v. Johnson (1894), 151 U. S. 81; Missouri, etc. Ry. v. Wood (Tex. 1899), 52 S. W. 93; Ray v. Dillingham (Tex. 1897), 41 S. W. 188; Bartlett v. Cicero, etc. Co. (1898), 177 Ill. 68; Branner, etc. Co. v. Central, etc. Co. (1897), 18 Ind. App. 174.

court will enforce his claim on a part of such rolling-stock temporarily in Ohio, as, against an attachment by an unsecured Kentucky creditor.<sup>40</sup> A court has no jurisdiction either to dissolve a foreign corporation,<sup>41</sup> or to compel a distribution of its assets, even though its trustees are residents,<sup>42</sup> or to appoint a receiver of a foreign corporation.<sup>43</sup> But it has been held that a court of equity has jurisdiction to wind up the affairs of an insolvent corporation doing business in the State, so far as to administer its assets within the jurisdiction of the court.<sup>44</sup> A statute which seeks to limit the distribution of such assets, to resident creditors, and to deny to individual creditors, resident in other States, the right to share therein, is unconstitutional and void.<sup>45</sup> Notwithstanding the fact that a receiver of the property of a foreign corporation has been appointed in the State which created it, the creditors of another State may, in the latter, reach and subject its property there, to the payment of their claims, by execution, attachment, or garnishment.<sup>46</sup> But, "if the property of a corporation within a State, has come into the actual or constructive possession of a receiver appointed in such State, and is taken temporarily out of the State, in course of business carried on by the receiver under authority of the court, as, railway cars, boats and vessels, bridge-building property sent for construction of a bridge in another State, etc.,—it can not, according to the better opinion, be attached, or taken on execution in the other State. By comity, the courts of the latter State will recognize and protect the possession and title of the receiver."<sup>47</sup> Where a corporation is in the hands of a receiver, and, before his appointment, a non-resident has attached the corporate property in another State, and the property

<sup>40</sup> *Bank v. McLeod*, 38 Ohio St. 174.

<sup>41</sup> *Dodge, etc. Co. v. Pyrolusite, etc. Co.*, 69 Ga. 665.

<sup>42</sup> *Redmond v. Enfield Manuf. Co.*, 13 Abb. Pr. N. S. (N. Y.) 332; *North, etc. Co. v. Field*, 64 Md. 151; *Young v. Farwell*, 139 Ill. 326.

<sup>43</sup> *Green v. Williams*, 22 R. I. 547.

<sup>44</sup> *Smith v. St. Louis, etc. Co.*, 6 Lea (Tenn.), 564; *Holbrook v. Ford*, 153 Ill. 663, 27 L. R. A. 324, 46 Am. St. Rep. 917; *Buswell v. Order of the Iron Hall*, 161 Mass. 224, 23 L. R. A. 846.

<sup>45</sup> *Blake v. McClung*, 172 U. S. 239; *People v. Granite, etc. Assn.*, 161 N. Y. 492; *Taylor, Priv. Corp.* 394.

<sup>46</sup> *Cole v. Oil Well Supply Co.*, 57 Fed. 534; *Catlin v. Wilcox Silverplate Co.*, 123 Ind. 477, 18 Am. St. Rep. 33; *Hunt v. Columbian Ins. Co.*, 55 Me. 290, 92 Am. Dec. 592; *Winters v. Globe, etc. Bank of Chicago*, 171 Mass. 425.

<sup>47</sup> *Clark & Marshall, Priv. Corps.* 2409, citing *Paradise v. Farmers', etc. Bank of Memphis*, 5 La. Ann. 710.

proved insufficient to fully satisfy his claim, he, as any other creditor, may present his claim for the balance due him. But, if such attachment was levied and the property sold, after the receiver's appointment, and with notice thereof to him, the creditor will not be allowed to come in and share with other creditors, without first renouncing the benefit of such attachment, and accounting for the value of the property as of the time of such attachment, and with interest.<sup>48</sup> The generally established rule, under the laws of corporate domicil, now is that a receiver can not maintain an action in a jurisdiction other than that of the court by which he was appointed.<sup>49</sup> Mr. High, after stating the general rule, adds: "It is thus apparent that the exceptions to the rule, denying to receivers any extra-territorial right of action, have become as well recognized as the rule itself, and the tendency of the courts is constantly toward an enlarged and more liberal policy in this regard. It is believed that the doctrine will ultimately be established, giving to receivers the same rights of action in all the States of the Union, with which they are invested in the State or jurisdiction in which they are appointed."<sup>50</sup> The exception referred to, leaves the rule to be, that a receiver will be permitted to maintain an action in a foreign State when it will not interfere with the rights and privileges of the citizens of the State, or contravene the policy of the laws of that State. "In the absence of statutory regulation, the appointment and title of a receiver may be recognized, and he may sue in the courts of another State, unless such suit works injustice or detriment to the citizens thereof, or contravenes the policy of its laws."<sup>51</sup> Attachment by a resident creditor made upon property of the corporation, takes precedence of the right of a foreign receiver, previously appointed, but who has not taken possession of the property.<sup>52</sup> A receiver, of a Connecticut corporation, does not acquire title to its property in Kentucky, against a subsequent attachment by a creditor there.<sup>53</sup>

<sup>48</sup> *Ward v. Conn. etc. Co.*, 71 Conn. 345, 71 Am. St. Rep. 207, 42 L. R. A. 706.

<sup>49</sup> *Wyman v. Eaton*, 107 Iowa, 214, 43 L. R. A. 695. The rule was first established by *Booth v. Clark*, 17 How. (U. S.) 321. See *Hale v. Hardon*, 95 Fed. 747.

<sup>50</sup> *Elliott, Priv. Corp.* 588.

<sup>51</sup> *Boulware v. Davis*, 90 Ala. 207, 8 South. 74, 9 L. R. A. 601; *Stoddard v. Lum*, 159 N. Y. 265,

45 L. R. A. 551, 7 Am. St. Rep. 541; *Bagby v. A. M. etc. Co.*, 86 Pa. St. 291; *Metzner v. Bauer*, 98 Ind. 425; *Cooke v. Town of Orange*, 48 Conn. 401; *Lycoming, etc. Co. v. Wright*, 55 Vt. 526.

<sup>52</sup> *Gray v. Covert* (Ind. 1900), 58 N. E. 731, 81 Am. St. Rep. 117; *Kruger v. Bank of Commerce* (1898), 123 N. C. 161, 31 S. E. 270.

<sup>53</sup> *Zacher v. Fidelity, etc. Co. (Ky. 1900)*, 59 S. W. 493; *Zacher*

**§ 1240. Receivers of railroads running into two or more States.**—The federal court may appoint a receiver of a corporation of another federal district, in the absence of objection by the corporation,<sup>54</sup> and where a railroad runs through several Circuits, the court in any one Circuit can not appoint a receiver over the entire line.<sup>55</sup> The same receiver will be appointed in the several Districts into which the road runs.<sup>56</sup>

**§ 1241. Ancillary receiverships.**—For the assets of an insolvent foreign corporation, within the State's jurisdiction, the court will appoint a resident receiver.<sup>57</sup> Stockholders or creditors cannot question the jurisdiction, when the corporation applies to the federal court in another State, for appointment of receiver there, for a corporation of a third State, the defendant corporation not objecting.<sup>58</sup> Where an ancillary receiver is appointed for a foreign corporation, the court will assume jurisdiction of domestic claims,<sup>59</sup> and may order payment of funds in the State, to a receiver in a foreign State.<sup>60</sup> After paying expenses of the domestic receivership, the receiver will remit the funds and assets to a receiver in the foreign State.<sup>61</sup> Where the foreign corporation has a receiver appointed where it was incorporated, he may also be appointed receiver in another State, by the court there where it does business, but he must account there for such business.<sup>62</sup> A second receiver will not be appointed where one is already in

v. Fidelity, etc. Co. (1901), 106 Fed. 583; Huntington v. Chesapeake, etc. Ry. (1899), 98 Fed. 459.

<sup>54</sup> Lewis v. American, etc. Co. (1902), 119 Fed. 391.

<sup>55</sup> Farmers', etc. Co. v. Northern Pacific R. R. (1895), 69 Fed. 871; Texas & Pacific Ry. v. Gay (1894), 86 Tex. 571.

<sup>56</sup> Dillon v. Oregon, etc. Ry. (1895), 66 Fed. 622; Port Royal, etc. Ry. v. King (1893), 93 Ga. 63, 19 S. E. 809, 24 L. R. A. 730; Farmers', etc. R. R. v. Northern Pac. (1896), 72 Fed. 26; Coltrane v. Templeton (1901), 106 Fed. 370.

<sup>57</sup> Holbrook v. Ford (1894), 153 Ill. 633, 27 L. R. A. 324, 46 Am. St. Rep. 917; Glines v. Order, etc. (1892), 20 N. Y. Supp. 275; Popper v. Supreme Council (1901),

61 N. Y. App. Div. 405; McNabb v. Porter, etc. Co. (1899), 44 N. Y. App. Div. 102; Schmidt v. Mitchell (1895), 98 Ky. 218, 33 S. W. 408; Logan v. McCall Pub. Co. (1893), 140 N. Y. 447; New York, etc. Co. v. Equitable, etc. Co. (1896), 71 Fed. 556; Sands v. Greely, etc. Co. (1897), 80 Fed. 195.

<sup>58</sup> Lewis v. American, etc. Co. (1902), 119 Fed. 391; Central T. Co. v. McGeorge (1894), 151 U. S. 129.

<sup>59</sup> Fawcett v. Order, etc. (1894), 64 Conn. 170, 24 L. R. A. 815.

<sup>60</sup> Durward v. Jewett (1894), 46 La. Ann. 559, 15 So. 386.

<sup>61</sup> Central, etc. Co. v. Farmers', etc. Co. (1902), 113 Fed. 405.

<sup>62</sup> Irwin v. Granite, etc. Assn., 56 N. J. Eq. 244 (1897).

charge.<sup>63</sup> The first receiver may be made receiver in a second action.<sup>64</sup>

**§ 1242. Compensation of receivers.**—It is in the discretion of the court to measure the allowance to be made to a receiver for his service, according to his ability and degree of responsibility. The former disposition to allow excessive compensation, was severely rebuked by the United States Supreme court in a case where it reduced allowance from \$130,000 to \$75,000.<sup>65</sup> A State court cannot fix the compensation of a federal receiver.<sup>66</sup> Where a receiver had possession of the property, and assignees in bankruptcy never had possession, they nevertheless were allowed compensation.<sup>67</sup> Payments at intervals may be allowed by the court, on account of compensation to the receiver, without waiting for termination of the receivership.<sup>68</sup> Allowance of reasonable fees may be made to the receiver's counsel.<sup>69</sup> The receiver is entitled to allowance for his own traveling expenses.<sup>70</sup> The persons at whose instance a receiver is appointed, may be held liable for the expenses of the receivership, to the extent that the amount, realized at foreclosure sale, fails to pay them.<sup>71</sup>

**§ 1243. Counsel fees in receiverships.**—The receiver's compensation, and that of his counsel, have priority in payment over receiver's certificates, but the trustee and his counsel are not allowed such priority.<sup>72</sup> The company's lawyer has no priority lien over the bonds, for service rendered the company under employ-

<sup>63</sup> Clap v. Interstate St. Ry., 61 Fed. 537 (1894); Mercantile, etc. Co. v. Florence, etc. Co. (1895), 111 Ala. 119, 19 So. 17; State v. McGee (S. D. 1901), 88 N. W. 115.

<sup>64</sup> Loyd v. Chesapeake, etc. R. R. (1895), 65 Fed. 351.

<sup>65</sup> Williams v. Morgan, 111 U. S. 684 (1884).

<sup>66</sup> Central Trust Co. v. Thurman (1894), 94 Ga. 735, 20 S. E. 141.

<sup>67</sup> Middaugh v. Wilson, 151 U. S. 333 (1894).

<sup>68</sup> Battery, etc. Bank v. Western, etc. Bank (1900), 126 N. C. 531, 36 S. E. 39; Wilkinson v. Washington T. Co. (1900), 102 Fed. 28; Maxwell v. Wilmington, etc. Co., 82 Fed. 214 (1897).

<sup>69</sup> Stuart v. Boulware, 133 U. S. 78 (1890); Phinizy v. Augusta, etc. R. R. (1896), 98 Fed. 776.

<sup>70</sup> Northern, etc. Ry. v. Hopkins (1898), 87 Fed. 505.

<sup>71</sup> Chapman v. Atlantic T. Co. (1902), 119 Fed. 257; Farmers' Nat. Bank v. Backus (1898), 74 Minn. 264; Ephraim v. Pacific Bank (1900), 129 Cal. 589, 69 Pac. 436; Barr v. Pittsburgh, etc. Co. (1893), 57 Fed. 86.

<sup>72</sup> Penn Co., etc. v. Jacksonville, etc. Ry. (1899), 93 Fed. 60; Petersburg, etc. Ins. Co. v. Dellatorre, 70 Fed. 643 (1895); Central Trust Co. v. Thurman (1894); 94 Ga. 735, 20 S. E. 141; Mauran v. Crown, etc. Co. (1901), 23 R. I. 324, 50 Atl. 387; Lyle v. Staten Island, etc. Co. (N. J. 1901), 48 Atl. 783; Chesapeake, etc. Ry. v. Atlantic, etc. Co. (N. J. 1901), 48 Atl. 997.

ment before the foreclosure.<sup>73</sup> Where the receivership was a scheme to wreck the corporation, the company's attorney, who was a party to the scheme, will not be allowed any claim for professional service.<sup>74</sup> Where the attorney has contingent interest in a claim, it will not be defeated by his clients assignment of the claim.<sup>75</sup> The attorney will be paid out of the assets of the bank, for collection of a claim, which he had undertaken before the receiver's appointment.<sup>76</sup> The court will not permit the receiver's employment of an attorney hostile to the interests represented by the receiver,<sup>77</sup> nor of an attorney who is interested on one side of the suit.<sup>78</sup> Where the stockholders' attorney's service in the suit is for contingent fees, and he recovers a large sum for the corporation, the court will order him paid out of the amount recovered.<sup>79</sup> The stockholder succeeding in his suit in behalf of the corporation, is entitled to reimbursement for expenses, including attorney's fees, and to have a lien therefor on the recovered property.<sup>80</sup> The master in chancery, who sells the property at foreclosure sale, is entitled to a reasonable allowance.<sup>81</sup>

**§ 1244. Compensation of mortgage trustees, in foreclosure.** The trustee in the mortgage is entitled to compensation and for expense of travel and counsel fees, incurred in preserving the property or in foreclosing the mortgage.<sup>82</sup> "There can be no doubt that trustees, and all others technically or actually occupying a representative character, are entitled to be reimbursed for all charges properly incurred in the discharge of the duties devolving upon them, out of the fund over which they have charge, and in which their constituents have an interest."<sup>83</sup>

<sup>73</sup> Finance Co. etc. v. Charles-ton, etc. R. R. (1892), 52 Fed. 526; People, etc. v. American, etc. Co. (1902), 70 N. Y. App. Div. 579; Grigg v. Mercantile T. Co. (1901), 109 Fed. 220.

<sup>74</sup> Baxter v. Lowe (1899), 93 Fed. 358.

<sup>75</sup> Central Trust Co. v. Rich-mond, etc. R. R. (1900), 105 Fed. 803.

<sup>76</sup> Sowles v. National Union Bank (1897), 82 Fed. 139.

<sup>77</sup> Farwell v. Great Western T. Co. (1896), 161 Ill. 522.

<sup>78</sup> Speiser v. Merchants' Ex-change Bank (1901), 110 Wis. 506.

<sup>79</sup> Crumlish v. Shenandoah Val-ley R. R. (1895), 40 W. Va. 627.

<sup>80</sup> Grant v. Lookout Mt. Co., 93 Tenn. 691 (1894), 28 S. W. 90, 27 L. R. A. 98; Hobbs v. McLean, 117 U. S. 567 (1886).

<sup>81</sup> Finance Committee v. War-ren (1897), 82 Fed. 525; Brown v. King (1894), 62 Fed. 529.

<sup>82</sup> 2 Perry Trusts, §§ 916-919.

<sup>83</sup> Southern Cal., etc. Co. v. Union L. & T. Co. (1894), 64 Fed. 450; Farmers' L. & T. Co. v. McClure (1897), 78 Fed. 209; Seibert v. Minneapolis, etc. Ry. (1894), 59 Minn. 65, 59 N. W. 826; Read v. Memphis, etc. Co. (Tenn. 1901), 64 S. W. 769; Premier Steel Co. v.

**§ 1245. Resignation, removal, and discharge of receivers.**  
**Embezzlement.**—Neither the corporation nor its property is liable for a judgment against the receiver, after his discharge.<sup>84</sup> For his misconduct, in his position, the court will remove the receiver, and appoint a successor,<sup>85</sup> either in term time or at chambers,<sup>86</sup> and pending actions against him are discontinued upon his removal.<sup>87</sup> Appeal from an order discharging him, does not continue the receivership.<sup>88</sup>

*Embezzlement. Liability of surety.*—In case of embezzlement by receiver, his surety is liable, although the appointment was illegal for want of jurisdiction of the court.<sup>89</sup> A judgment against the receiver after his discharge, is void.<sup>90</sup> That he is discharged by the federal court which appointed him, is no defense to a suit pending against him in a State court.<sup>91</sup> His successor may proceed to carry on a suit instituted by the first receiver, and in his name,<sup>92</sup> and may be sued for acts committed by him.<sup>93</sup> Forfeiture of the charter by a State court, does not affect the *status* of a federal receiver.<sup>94</sup> The receiver can not prevent his discharge, where all parties consent to vacant the receivership.<sup>95</sup> The court can not refuse to discontinue a creditor's suit at the instance of the complainant of record, where the other creditors have proved their claims in the suit.<sup>96</sup>

Yandes (1894), 139 Ind. 307; Phinizy v. Augusta, etc. R. R., 98 Fed. 776 (1896); Tompkins Co. v. Chester Mills (1898), 90 Fed. 37; Bound v. South Carolina Ry., 59 Fed. 509 (1894).

<sup>84</sup> Texas, etc. Ry. v. Watson, 24 S. W. 952 (Tex. 1894).

<sup>85</sup> Etowah Min. Co. v. Wills, etc. Co. (1895), 106 Ala. 492, 17 So. 522; Olmsted v. Distillery, etc. Co. (1895), 67 Fed. 24.

<sup>86</sup> Walters v. Anglo, etc. Co., 50 Fed. 316 (1892).

<sup>87</sup> Boggs v. Brown. (1891), 82 Tex. 41, 17 S. W. 830.

<sup>88</sup> State v. Superior Court, 71 Pac. 1095 (Wash. 1903).

<sup>89</sup> Baltimore, etc. Assn. v. Alderson (1900), 99 Fed. Rep. 489.

<sup>90</sup> Tex., etc. Ry. v. Watson, 13 Tex. Civ. App. 555 (1896), 36 S. W. 290.

<sup>91</sup> Dougherty v. King (1899), 41 N. Y. App. Div. 1.

<sup>92</sup> Hegewisch v. Silver (1893), 140 N. Y. 414.

<sup>93</sup> McNulta v. Lochbridge, 141 U. S. 327 (1891).

<sup>94</sup> City, etc. Co. v. State (1895), 88 Tex. 600.

<sup>95</sup> Engle v. Florida, etc. R. R., 14 Fla. 266 (1873).

<sup>96</sup> Johnson v. Miller (1899), 96 Fed. 271.

## CHAPTER LII.

### REINCORPORATION AND REORGANIZATION.

<p>§ 1246. Reorganization, reincorporation and consolidation distinguished.</p> <p>1247. Reincorporation, extension, revival, and renewal of charter. Whether the old corporation is continued, or a new corporation created.</p> <p>1248. Power to reincorporate and reorganize.</p> <p>1249. Methods of effecting reorganization.</p> <p>1250. Reorganization by disposing of assets without foreclosure. Scaling down securities.</p> <p>1251. Reorganization by sale under foreclosure, and purchase under agreement.</p> <p>1252. Reorganization agreement. Rights and obligations of the parties.</p>	<p>§ 1253. Participation by stockholders and bondholders in the reorganization.</p> <p>1254. Pledger of bonds taking part in reorganization.</p> <p>1255. Limited time for bondholders to join in the reorganization.</p> <p>1256. Powers of bondholders, reorganization committee.</p> <p>1257. Reorganization under statutory regulations.</p> <p>1258. The new corporation, when not <i>bona fide</i> purchaser of assets of the old.</p> <p>1259. Liability of the new corporation for debts and torts of the old.</p> <p>1260. Liabilities of the old corporation.</p> <p>1261. Change of state bank to national bank.</p>
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#### References:

Purchase by bondholders and stockholders for reorganization.

Section 1201.

Transfer of property to the new corporation. Section 1202.

Whether franchises and exemptions pass under foreclosure sale to the new corporation. Section 1203.

Liability and rights of the new company. Sections 1285-1291.

Consolidation. Sections 1277-1291.

**§ 1246. Reorganization, reincorporation, and consolidation, distinguished.**—"Reincorporation" occurs where the members of the corporation are allowed by the State to dissolve it by surrender of the charter or otherwise, and to incorporate under a new charter; but amendment of the old charter, and rearrangement of the corporate business under it, without creating a new corporation, is "reorganization." There may be "reorganization" of a corporation by continuing its existence, without any dissolution and either under the old name or a new one, and under the

same or new management, and under new powers by amendment of the charter. It is not the necessary effect of reorganization, to create a new corporation, but reorganization is generally now affected by dissolving the existing corporate body, organizing an entirely new one, and transferring to it the property and assignable franchises of the old organization. This is "reincorporation."<sup>1</sup> A "consolidation" is effected by the union of two or more corporate bodies under one organization; and this may be an entirely new corporation, or the merger of one or more existing corporations in another, by dissolution of one or more of the constituent companies.<sup>2</sup> Consolidation necessitates reorganization, but there may be consolidation, or reorganization without reincorporation.

**§ 1247. Reincorporation, extension, revival and renewal of charter. Whether the old corporation is continued or a new corporation created.**—Extension, revival, or renewal of the corporate charter for an additional period, when its term of existence has expired or is about to expire, may be by special act,<sup>3</sup> or by general law.<sup>4</sup> Such an act does not create a new corporation,<sup>5</sup> but merely revives and continues the old one under its original charter, without any reorganization, interruption or change,<sup>6</sup> and without affecting its powers or identity as a corporation, or its property or other rights or contract liabilities.<sup>7</sup> In effect, such revival is only an amendment of the charter, just as the corporation, by amendment of its articles, under authority of general law, may alter and extend its period of existence.<sup>8</sup> Where by special act, a new charter is granted to a corporation created under general law or by special act, no new corporation is created, but the effect is to amend the original charter.<sup>9</sup>

<sup>1</sup> *Miller v. English*, 21 N. J. Law, 317; *Houston, etc. R. R. Co. v. Shirley*, 54 Tex. 125; *Bruffet v. Great Western R. Co.*, 25 Ill. 353; *State v. Sherman*, 22 Ohio St. 413; *Morgan Co. v. Thomas*, 76 Ill. 120.

<sup>2</sup> *Central R. R. Co. v. Georgia*, 92 U. S. 665.

<sup>3</sup> *Augusta, etc. R. Co. v. City Council*, 100 Ga. 701, 28 S. E. 126; *Foster v. Essex Bank*, 16 Mass. 245, 8 Am. Dec. 135; *Cotton v. Miss., etc. Boom Co.*, 22 Minn. 372.

<sup>4</sup> *Ovid, etc. Co. v. Secretary of State*, 90 Mich. 466.

<sup>5</sup> *Frostburg Min. Co. v. Cumberland, etc. R. Co.*, 81 Md. 28; *Lincoln, etc. Bank v. Richardson*, 1 Me. 79, 10 Am. Dec. 34.

<sup>6</sup> *National Exchange Bank v. Gay*, 57 Conn. 224; *Port Gibson v. Moore*, 21 Miss. 157.

<sup>7</sup> *Lincoln, etc. Bank v. Richardson*, 1 Me. 79, 10 Am. Dec. 34.

<sup>8</sup> *Commonwealth v. Cullen*, 13 Pa. St. 133, 53 Am. Dec. 450.

<sup>9</sup> *Woodfork v. Union Bank, etc.*, 3 Coldw. (Tenn.) 488; *Johnston v. Crawley*, 25 Ga. 316, 71 Am. Dec. 173.

*Whether the old corporation is continued, or a new corporation created.*—Mere extension of the charter before its expiration, does not in effect create a new corporation,<sup>10</sup> as, in extending the period of existence of a national bank, under an act of Congress.<sup>11</sup> If the statute merely continues the existence of the corporation, after its period of existence has expired, though with different powers and under a different name and management, its rights and liabilities as they existed before the change, remain unaffected.<sup>12</sup> Reorganization, by forming a new corporation in another State identical in corporate name and objects, does not render the two corporations identical. Stockholders can not avoid their liabilities by selling out their property to a new corporation incorporated in another State. This has been called “its burial in one State, with the purpose to resurrect it in another State. For the deeds done in the first body, the old stockholders are liable in this new world.”<sup>13</sup> But, it is otherwise in case of the *bona fide* dissolution of the old corporation, and the creation of a new one.<sup>14</sup> The stockholders or creditors of a corporation, whose assets are about to be sold under judicial sale, in pursuance of execution or decree in foreclosure of mortgage, may, or any other persons may, organize a corporation, under a general law for the purpose of purchasing at the sale, and continuing the business,—and this is the creation of a new corporation.<sup>15</sup> Whether the effect of extension and revival of the charter is to reincorporate, and to create a new corporation, or simply to reorganize and continue the old corporation, is a question of intention. “To ascertain whether a charter created a new corporation, or merely continued the existence of an old one, we must look to its terms and give them a construction consistent with the legislative intent and the intent of the corporation.”<sup>16</sup>

<sup>10</sup> *Frostburg Min. Co. v. Cumberland, etc. R. Co.*, 81 Md. 28; *National Exchange Bank v. Gay*, 57 Conn. 224.

<sup>11</sup> *National Exchange Bank v. Gay*, 57 Conn. 224.

<sup>12</sup> *Miller v. English*, 21 N. J. 317; *Cotton v. Miss., etc. Boom Co.*, 22 Minn. 372; *Lincoln, etc. Bank v. Richardson*, 1 Me. 79, 10 Am. Dec. 34.

<sup>13</sup> *Andrews*, Am. Law, § 508; *Sprague v. National Bank*, 172 Ill. 149, 42 L. R. A. 606, 64 Am. St. Rep. 17.

<sup>14</sup> *Bellows v. Hallowell, etc. Bank*, 2 Mas. 31, Fed. Cas. No. 1,279.

<sup>15</sup> *Kittel v. Augusta, etc. R. Co.*, 78 Fed. 855; *Midland Ry. Co. v. Fisher*, 125 Ind. 19, 21 Am. St. Rep. 189; *People v. Cook*, 110 N. Y. 443; *Gulf Col., etc. Co. v. Newell*, 73 Tex. 334, 15 Am. St. Rep. 788.

<sup>16</sup> Mr. Justice Story in *Bellows v. Hallowell, etc. Bank*, 2 Mas. 31, Fed. Cas. 1,279.

*Change of name* of corporation does not necessarily change its identity,<sup>17</sup> and although a reorganized corporation retains the same name, it may be an entirely new corporation depending upon the intention.<sup>18</sup> A new corporation is effected by reorganization, and not a mere amendment of the charter.<sup>19</sup> If fraud be shown in the transfers of property from the old corporation to that newly organized, it can not be treated as a continuance of the old corporation, and liable at law for its debts, respecting the property, however liable it may be in equity.<sup>20</sup>

**§ 1248. Power to reincorporate and reorganize.**—In the United States, a majority of the holders of bonds secured by mortgage of the property of the corporation, can not by statute be empowered to coerce the minority into a reorganization of the corporation, without foreclosure of the mortgage,—if the attempt would be to impair the obligation of the corporate contract with the bondholder. But, there being in England no constitutional limitation upon the power of parliament to enforce a corporate reorganization upon a minority of the stockholders, it is held by the United States Supreme Court that such a proceeding there will be binding upon citizens of the United States holding bonds in such foreign corporation.<sup>21</sup> The power to reorganize, or reincorporate, exists only by legislative authority, as in the case of original incorporation. Either under general incorporation law, or by other statute, the States generally have provided for reorganization and for reincorporation.<sup>22</sup> A statute authorizing reincorporation of "any existing corporate association or society incorporated," authorizes reincorporation of a defectively organized corporation,<sup>23</sup> and of a corporation practically dissolved, by non-user of the powers necessary for its preservation.<sup>24</sup>

**§ 1249. Methods of effecting reorganization.**—The reorganization of a corporation may be brought about by the formation of a new corporation, which comes into possession of the property and franchises of the old corporation and continues its business,

<sup>17</sup> *Dean v. La Motte Lead Co.*, 59 Mo. 523; *Trustees, etc. v. Moody*, 62 Ala. 389.

<sup>18</sup> *Bellows v. Hallowell, etc. Bank*, 2 *Mas.* 31, *Fed. Cas.* No. 1,279; *Wyman v. Hallowell, etc. Bank*, 14 *Mass.* 57, 7 *Am. Dec.* 194.

<sup>19</sup> *Marshal v. Western, etc. R. R.* (1885), 92 *N. C.* 322.

<sup>20</sup> *Armour v. E. Bement Sons* (1903), 123 *Fed.* 56.

<sup>21</sup> *Canada So. Ry. Co. v. Gebhard*, 109 *U. S.* 527. See *Gilfillin v. Union Canal Co.*, 109 *U. S.* 401; *Vatable v. New York, etc. Ry. Co.*, 96 *N. Y.* 49.

<sup>22</sup> *State v. Steele*, 37 *Minn.* 428; *People v. De Grauw*, 62 *Hun (N. Y.)* 224, 133 *N. Y.* 254.

<sup>23</sup> *State v. Steele*, 37 *Minn.* 428.

<sup>24</sup> *First Society, etc. Church v. Brownell*, 5 *Hun (N. Y.)*, 464.

—it may be, on a new basis.<sup>25</sup> It may be by the transfer of the corporate property and business, without foreclosure, to other control, upon the expiration of the corporation by lapse of time, or the renewal of the charter of the deceased corporation,<sup>26</sup> or the consolidation of two or more corporations which may unite in a new company, or undergo absorption by an existing corporation,—all loosely spoken of as reorganization. None of these, however, is reorganization in its strictly legal sense.<sup>27</sup> The term “reorganization,” in corporation law, has a technical meaning, and is generally applied to the measures taken, after corporate insolvency, to preserve and re-adjust the interests of the stockholders and the mortgage creditors,<sup>28</sup> which measures are usually precipitated by the foreclosure of the mortgage resting upon the property, and may either precede, accompany, or follow the decree of foreclosure and sale.<sup>29</sup> Where, upon the insolvency of a corporation, and default upon its mortgage obligations, the mortgagees undertake to realize their security, and proceed to a decree of foreclosure and sale, the purchasers at the sale become the owners of the property, and may either form a new company or may transfer the property to an existing organization.<sup>30</sup> By this means the rights and interests of the old stockholders are disposed of,<sup>31</sup> unless they come to some understanding with the mortgagees as to their future *status*, before the decree of foreclosure. This they are generally able to accomplish, for, by means of injunctions, demurrers, cross-bills, motions, commissions to take testimony, and various other weapons, they have the power to embarrass the progress of the foreclosure proceedings to such an extent that the bondholders willingly embrace the opportunity for negotiation, which results in a plan for reorganization in which all interests are recognized.<sup>32</sup> Where there has been a complete and valid

<sup>25</sup> 1 Ry. & Corp. L. J. 97.

<sup>26</sup> 2 Morawetz on Private Corporations.

<sup>27</sup> Vide *infra*, CONSOLIDATION, §§ 1262-1291. See Reilly v. Ogleby, 25 W. Va. 36; Banks v. Judah, 8 Conn. 145; San Francisco, etc. R. Co. v. Bee, 48 Cal. 398.

<sup>28</sup> 1 Ry. & Corp. L. J. 97.

<sup>29</sup> Canada Southern Ry. Co. v. Gebhard, 109 U. S. 509.

<sup>30</sup> People v. Brooklyn, etc. Ry. Co., 89 N. Y. 75. *Cf.* Acres v.

Moyne, 59 Tex. 623, 625; Wellsborough, etc. Co. v. Griffin, 57 Pa. St. 417.

<sup>31</sup> Thornton v. Wabash Ry. Co., 81 N. Y. 462.

<sup>32</sup> Jones on Railroad Securities, § 614. Ordinary foreclosure, without the intervention of these amicable methods, is “destructive of vast pecuniary interests, harsh to junior lienors, and inconsistent with the public right to have a highway continuously operated. Those who are subordinate to the

reorganization, it will not be opened or disturbed,—the rights of all parties having been properly adjusted,<sup>33</sup> and it has been held that stockholders are chargeable with notice of the existence of the law, and with the general features of the scheme of reorganization, and can not maintain an action to be allowed to participate, after the expiration of the time within which they should have come in.<sup>34</sup>

**§ 1250. Reorganization by disposing of assets without foreclosure. Scaling-down securities.**—Where a corporation is in embarrassment and unable to pay the interest on its bonds, reorganization may be effected without foreclosure of the mortgage. This is done by agreement between the stockholders and bondholders, in pursuance of which the stocks or bonds or both are readjusted, new bonds being exchanged for the old, and at reduced rate of interest, and new stock issued to the stockholders. This arrangement necessitates consent of all the stockholders and bondholders whose rights are to be effected. The court may compel any dissenting bondholder to surrender his bonds upon tender of the payment due thereon.<sup>35</sup> In New York, there are a number of statutes prescribing methods of reorganization.<sup>36</sup>

first lien have opposed it bitterly, since they earnestly believe their expectations to be of the nature of a vested interest, which should not be interfered with so long as they are willing to bear some sacrifices for the realization of those expectations. Almost endless and Titanic litigations have been the result. Courts have leaned against the strict forfeiture of equities of redemption forever cutting off such contingent but vast pecuniary interests." . . . "The absolute right of foreclosure, while admitted in theory, is made so difficult of accomplishment in practice that it amounts almost to a denial of a contract obligation of the railway mortgagors. Therefore there is a semi-enforced acquiescence by first mortgagees in almost every case where the junior lienors and stockholders exhibit any willingness to place, by assessment on their own holdings, the property in proper repair and efficient con-

dition; adding thereby to the security of the first lien, and either paying or funding the defaulted interest on prior liens." "Railway Reorganization," by Simon Sterne (Sept., 1890), 10 Forum, 37. Cf. "Arrangements in Connection with Insolvent Companies," 57 L. T. 76; Robinson v. Philadelphia, etc. R. Co., 28 Fed. Rep. 340; Ricker v. Alsop, 27 Fed. Rep. 251.

<sup>33</sup> Matthews v. Murchison, 15 Fed. Rep. 691; Wetmore v. St. Paul, etc. R. Co., 5 Dill. 531. Bondholders, who have assented to the plan, in order to obtain new bonds, must deliver up the old ones before the purchase at the foreclosure sale. Carpenter v. Catlin, 44 Barb. 75.

<sup>34</sup> Vatable v. New York, etc. R. Co., 96 N. Y. 49.

<sup>35</sup> Pollitz v. Farmers' Loan, etc. Co., 53 Fed. 210.

<sup>36</sup> N. Y. Laws of 1850, ch. 140, § 5, as amended by N. Y. Laws of 1854, ch. 282, and by N. Y. Laws

The New York Stock Corporation Law of 1890 provides, that at or prior to the sale, the purchasers, or the persons for whom the purchase is to be made, may make an agreement for the adjustment of the interests of the mortgage creditors and the stockholders, for a representation of the interests in the new corporation, and may make regulations with respect to voting by the stockholders and bondholders. The plan must be consistent with the laws of the State, and is binding upon the corporation, until changed as provided therein, or as otherwise provided by law. Bonds and stock may be issued in accordance with the plan, in the new corporation, which may, at any time within six months after its organization, settle any debts of the old corporation, upon such terms as may be approved by the trustees or agents intrusted with the execution of the plan of reorganization. Stockholders in the old corporation may assent to the plan, at any time within six months after the formation of the new company, and, upon complying with the terms of the plan, may become entitled to their share of the benefits.<sup>37</sup> Similar statutes exist in other State.<sup>38</sup> Special acts are also sometimes passed, incorporating

of 1874, ch. 430; "The Stock Corporations Law of 1890," N. Y. Laws of 1890, ch. 564, §§ 1-7; Pratt v. Munson, 84 N. Y. 582. The fee for incorporation must be paid in the case of a corporation so organized as if it were originally formed. People v. Cook, 110 N. Y. 443. And the passage of an act requiring the payment, upon incorporation, of a tax amounting to a certain percentage of the capital stock, subsequent to the formation of the insolvent company, applies to a corporation formed by the purchasers at a foreclosure sale (People v. Cook, 110 N. Y. 443), for it is held that statutes authorizing the mortgaging of corporate property do not constitute a contract on the part of the state with the mortgagors that the act providing for the incorporation of purchasers at a mortgage sale will not be altered. Memphis, etc. R. Co. v. Commissioners, 112 U. S. 699. See, also, Beach on Railways, § 766.

<sup>37</sup> N. Y. Laws of 1890, ch. 564, § 3.

<sup>38</sup> Ohio Rev. Stat. (1880), §§ 3393 *et seq.*; Indiana Rev. Stat. (1881), §§ 3945 *et seq.* The provision of the Arkansas constitution (Ark. Const. 1874, art. xii) that "no private corporation shall issue stock or bonds except for money or property actually received, and all fictitious increase of stock or indebtedness shall be void," has been held not to prohibit mortgage bondholders, who buy in the property and franchise of a corporation upon foreclosure sale under their mortgage, from declaring upon what terms they will surrender those interests, and it is competent for them to reorganize on substantially the same basis, with regard to capital stock and bonded indebtedness, as that of the old corporation before the present constitution was adopted, even though they thereby receive both stock and bonds in a large amount, of which the amount of the stock alone is sufficient to

the purchasers of corporate property at a foreclosure sale.<sup>39</sup> Reorganization, otherwise than by sale in foreclosure, requires the unanimous consent of the bondholders and stockholders.<sup>40</sup> A reorganization may be effected by a foreclosure sale, and conveyance by the purchaser to the old corporation, he retaining a vendor's lien.<sup>41</sup> It may be effected without foreclosure, the majority bondholders giving bond for payment in full to the dissenting bondholders.<sup>42</sup> Minority stockholders can not be compelled to scale their bonds to seventy-five per cent. of par value, to enable reorganization of the company.<sup>43</sup> They can not be compelled to exchange their stock for stock in another corporation, at lower basis than that allowed to it.<sup>44</sup>

**§ 1251. Reorganization by sale under foreclosure, and purchase under agreement.**—Reincorporation, and reorganization, now most commonly occur where a corporation is in default of interest on its bonds. The common procedure, which is approved and favored by the courts, is sale of the corporate property under power to the trustee in the mortgage or deed of trust, given to secure the payment of the bonds and interest so in default, or sale under decree of foreclosure; the agent for the bondholders buys in the property, a new corporation is formed, and the purchased property is conveyed to it in exchange for stock or bonds, or both, to be issued to the old bondholders in pursuance of their agreement.<sup>45</sup> The bondholders can not impeach, as fraudulent, the issue of the bonds, where they deposited them and a copy of the mortgage, taking receipt reciting the deposit and terms of agreement made to reorganize, by which agreement they were

cover the full value of the property, rights and privileges of the reorganized company. *Memphis & Little Rock R. Co. v. Dow*, 120 U. S. 287.

<sup>39</sup> *Wilmington, etc. R. Co. v. Downward* (Del. 1888), 4 Ry. & Corp. L. J. 230.

<sup>40</sup> *Hollister v. Stewart*, 111 N. Y. 644 (1889); *McLeod v. Lincoln, etc. Co.* (Neb. 1904), 98 N. W. 672.

<sup>41</sup> *State v. Farmers' L. & T. Co.* (1891), 81 Tex. 530, 17 S. W. 60.

<sup>42</sup> *Pollitz v. Farmers' L. & T. Co.* (1892), 53 Fed. 210; *Gresham v. Island City Sav. Bank* (1893), 2 Tex. Civ. App. 52, 21 S. W. 556;

*Dester v. Ross* (1891), 85 Mich. 370.

<sup>43</sup> *Lake, etc. R. R. v. Ziegler*, 99 Fed. 114 (1900); *In re Murray Hill Bank* (1897). N. Y. L. J., Feb. 5, 1897.

<sup>44</sup> *People v. Anglo-American, etc. Assn.* (1901), 60 N. Y. App. Div. 389.

<sup>45</sup> *Vide supra*, § 1201; *Easton v. German Am. Bank*, 127 U. S. 532; *Shaw v. Little Rock, etc. Co.*, 100 U. S. 605; *Mackintosh v. Flint, etc. R. Co.*, 34 Fed. 582; *Robinson v. Philadelphia, etc. Co.*, 28 Fed. 340; *Platt v. Philadelphia*, 65 Fed. 872; *Child v. N. T., etc. R. Co.*, 129 Mass. 170.

to receive preferred stock in the new company, and authorized it to issue bonds secured by mortgage, which they did for money and property needed in the corporate business.<sup>46</sup> Purchasing bondholders may turn in their bonds in payment at proper valuation. This in law is considered the same as payment in cash.<sup>47</sup> Bonds of the old company exchanged for those of the reorganized corporation, are not cancelled so as to give priority to holders of junior mortgages.<sup>48</sup> Bondholders who join in foreclosure sale, purchase and reorganization of the corporation, waive their rights to the old bonds.<sup>49</sup>

**§ 1252. Reorganization agreement. Rights and obligations of the parties.**--The reorganization agreement usually provides that stockholders of the old corporation may have stock in the new one, upon certain conditions, such as the surrender of two shares of stock for one, or submitting to an assessment upon their stock for reorganization purposes. A certain time is given them to signify their acceptance of the conditions,<sup>50</sup> and if they neglect to do so within the required time, they lose their rights and the courts can give no relief<sup>51</sup>—for the new corporation can not be forced to admit them. The only remedy left is to impeach the foreclosure proceedings.<sup>52</sup> All the provisions of the reorganization agreement must be strictly carried out by the parties.<sup>53</sup> A committee, therefore, appointed to receive and disburse subscriptions for the purpose of effecting a consolidation of certain railroad companies, and extending the lines, may be required to account to the subscribers for the amount so received, and it is immaterial whether or not they were originally trustees, or were

<sup>46</sup> Big Creek, etc. v. American, etc. Co. (Tenn. 1904), 127 Fed. 625 (U. S., C. C. A.).

<sup>47</sup> Rumsey v. People, etc. Ry. (1899), 154 Mo. 215; Moran v. Hagerman (1894), 64 Fed. 499; Mercantile Trust Co. v. Kanawaha, etc. Ry. Co. (1893), 58 Fed. 6; American Waterworks Co. v. Farmers' L. & T. Co. (1896), 73 Fed. 956.

<sup>48</sup> United States Rubber Co. v. Cincinnati, etc. Ry. Co. (1892), 58 Fed. 500.

<sup>49</sup> Trust Nat. Bank v. Radford Trust Co. (1897), 80 Fed. 569; Central Trust Co. v. Cincinnati, etc. Ry. (1892), 58 Fed. 500.

<sup>50</sup> N. Y. Laws of 1890, ch. 564.

<sup>51</sup> Vatable v. New York, etc. R. Co., 96 N. Y. 57; Thornton v. Wabash R. Co., 81 N. Y. 462; Landis v. Western, etc. R. Co., 133 Pa. St. 579.

<sup>52</sup> Vatable v. New York, etc. R. Co., 96 N. Y. 57; Thornton v. Wabash Ry. Co. (1880), 81 N. Y. 462; Vanalstyne v. Houston, etc. R. Co., 56 Tex. 377.

<sup>53</sup> Miller v. Rutland, etc. R. Co., 40 Vt. 399; Trust Nat. Bank v. Radford, etc. Co. (C. C. A.), 80 Fed. 569; Dester v. Ross, 85 Mich. 370.

legally appointed.<sup>54</sup> Fraud on the part of the promoters of a reorganization scheme, secret agreements and the like, constitute a wrong for which equity will grant relief.<sup>55</sup> And it has been held that even where a sale is authorized by the majority of the stockholders, it may be set aside,<sup>56</sup> and the minority shareholders are not bound by a reorganization scheme of the majority, whereby the property is to be transferred to the new company at a valuation fixed by the majority, unless it be shown that no more could be obtained at a cash sale at auction.<sup>57</sup> When there is nothing in the plan proposed, that is, of itself, illegal or expressly prohibited by statute, the stockholders who are present at the time of the discussion of its adoption and who voted for it, are thereafter estopped from attacking it on the ground that it is *ultra vires*,—for a corporate act not prohibited by law (for the performance of which there is only want of power),—may afterwards be made good by the ratification of the stockholders.<sup>58</sup> And where a stockholder was denied participation in the reorganization, he will be barred of relief in equity, by laches, unless he promptly asserts

<sup>54</sup> Gould v. Seney (N. Y. Sup. Ct. 1890), 5 N. Y. Supp. 928, 9 id. 818. In this case a consolidation of three railroad companies was proposed, the necessary funds to be raised by subscriptions of the stockholders of the several companies. It was doubtful whether one of the companies (the R. & A.) could obtain legislative consent to enter the combination, but it was arranged that the other two should combine at all events, and the subscribers were aware of this. The first call under the subscription stated that it was for the extension of one of the two roads whose consolidation was definitely arranged for, and for "other purposes." Afterwards the entire fund was paid in. A committee was appointed, after the first installment was paid, to receive and disburse the fund. After this the consolidated agreement was filed. It was held that a loan by the committee to the R. & A. company, for the purpose of completing its line of railroad, to be

re-paid in case the agreement should not become operative as to that company, was a misappropriation of the fund, for which they became liable to account to the subscribers upon the legislature refusing to consent to the company entering the combination; but that the shareholders could not, at the time of compelling the accounting, insist that the committee should also account for bonds taken as collateral for the loan.

<sup>55</sup> Cf. *Ex parte* White, 2 S. C. 469; Bliss v. Matteson, 45 N. Y. 22.

<sup>56</sup> Reilly v. Oglesby (1884), 25 W. Va. 36. Though when they act in good faith and take no improper advantage of their co-stockholders or other interests, a purchase of them will be ratified. Carter v. Ford, etc. Co., 85 Ind. 180.

<sup>57</sup> Mason v. Péwabic Min. Co., 25 Fed. Rep. 882.

<sup>58</sup> Kent v. Quicksilver Min. Co., 78 N. Y. 186.

his rights.<sup>59</sup> The assignee of stockholders who voted for the ratification of a reorganization plan, can not thereafter complain that there was want of power, provided there is no legal objection.<sup>60</sup> So, also, where a plan of reorganization of a railroad company has been presented to and ratified by the stockholders at an annual meeting, and a majority of the stockholders have subscribed for stock in pursuance of the scheme, a plaintiff, who has acquired his stock since the adoption of the plan from stockholders who voted in favor of it, can not (where nothing in the plan is expressly prohibited by statute), insist that the plan is *ultra vires*, nor ask a court of equity to enjoin the officers of the corporation from doing what his predecessors, as owners, expressly authorized.<sup>61</sup> On the other hand, although (where the foreclosure proceedings have reached the stage at which a sale is had), without an agreement between bondholders and stockholders, the rights of the latter are barred, yet, if there has been an agreement, the stockholders may maintain an action for damages for a breach thereof.<sup>62</sup> And if the trustee of the mortgage, in whose name the foreclosure proceedings are had, is under contract with the bondholders, he is liable to them for a breach of trust,

<sup>59</sup> Crawshay v. Soutter, 6 Wall (U. S.), 739; Symes v. Union Trust Co. of N. Y., 60 Fed. 830; Foster v. Mansfield, etc. Co., 146 U. S. 88; Burgess v. St. Louis County Ry. Co., 99 Mo. 496; Kitchen v. St. Louis, etc. Co., 69 Mo. 224; Carey v. Houston, etc. Ry. Co., 52 Fed. 671; Wetmore v. St. Paul, etc. Co., 3 Fed. 177; Ashurst's Appeal, 60 Pa. St. 290; Twin Lake Oil Co. v. Marbury, 91 U. S. 587.

<sup>60</sup> Kent v. Quicksilver Min. Co., 78 N. Y. 186.

<sup>61</sup> Hollins v. St. Paul, etc. R. Co. (N. Y. Sup. Ct. 1890), 6 Ry. & Corp. L. J. 493. Upon a motion for a preliminary injunction enjoining the proceedings for reorganization, Ingraham, J., said: "I do not think as against either the corporation or the persons who relying upon the action of the stockholder have subscribed for the capital stock of the new company to carry out the plan proposed, the plaintiff can now insist

that the proposed plan is *ultra vires*, or at any rate is in such a position as to ask a court of equity to enjoin the officers of the corporation or the corporations defendants from doing what his predecessors, as owners of the stock, expressly authorized and directed the officers of the company to do. Whether or not a preliminary injunction should be granted in such an action is largely in the judicial discretion of the court; and where a single stockholder owning a very small proportion of the stock of the corporation seeks to restrain a corporation from doing an act ratified by a large majority of the stockholders, he must present to the court a clear legal right to the relief demanded, and show that the injunction he asks for is essential to the preservation of his legal rights."

<sup>62</sup> Marie v. Garrison (1880), 83 N. Y. 14.

in case he fails to perform.<sup>63</sup> Where there is an agreement between the stockholders of a corporation and its creditors for reorganization of the company, and the issue of new stock in lieu of the old, on condition that the old stockholders pay an assessment sufficient to discharge the floating debt, and another corporation is designated to make the assessment and distribute the stock,—it has no arbitrary power to fix the assessment, but is charged with a trust duty, and the stockholders may enjoin the distribution of the stock, until the determination of their rights under the agreement.<sup>64</sup> There is some conflict of opinion as to whether a majority of the mortgage creditors may legally bind the minority by the provisions of an agreement for reorganization. In a case in Connecticut this right has been upheld.<sup>65</sup> On the other hand, in a more recent case in New York it was held that a scheme of reorganization can only be made effective by the consent of all the bondholders, or by a foreclosure cutting off their lien; that even a single bondholder may stand upon his rights as stated in the contract, and that the trustees had no power to make a new one for him.<sup>66</sup> A majority of the stockholders can not exchange the corporate stock, for stock in another corporation, either to be held by the former, or to be distributed among the stockholders in consideration for their shares, without their consent, so as to compel any dissenting shareholder to accept shares in the other corporation.<sup>67</sup> Where, however, the mortgage

<sup>63</sup> James v. Cowing (1880), 82 N. Y. 449.

<sup>64</sup> Gernsheim v. Olcott (1890), 7 N. Y. Sup. 872.

<sup>65</sup> Gates v. Boston, etc. R. Co. (1885), 53 Conn. 333; Shaw v. R. Co., 100 U. S. 605. Cf. Canada Southern Ry. Co. v. Gebhard, 109 U. S. 527. The court said: "In making this claim the plaintiff ignores, or subordinates to his own claim, both the private rights of his co-bondholders and the public rights vested in trust in the state, while upon every true theory and exposition of his contract, the rights of the public are superior to his private rights, and the rights and interests of his co-bondholders are equally with his own to be protected by the law. The plaintiff's argument treats

this matter as one of strict legal private right of an individual creditor against or to private property of an individual debtor, instead of a claim of exceptional character upon property of a peculiar nature, in which private rights of others and the right of the public exist, which must be regarded and protected."

<sup>66</sup> Hollister v. Stewart, 11 N. Y. 644, distinguishing Canada Southern R. Co. v. Gebhard, 109 U. S. 527, cited *supra*.

<sup>67</sup> Lauman v. Lebanon Ry. Co., 30 Pa. St. 42, 72 Am. Dec. 685; People v. Ballard, 134 N. Y. 269; Elyton Land Co. v. Dowdell, 113 Ala. 177, 59 Am. St. Rep. 105; Easum v. Buckeye, etc. Co., 51 Fed. 156.

provides that the majority of the bondholders should decide the terms of reorganization, the minority are, of course, bound by the contract.<sup>68</sup>

**§ 1253. Participation by stockholders and bondholders in the reorganization.**—Any person, whether bondholder, stockholder, or general creditor, is entitled to participate, upon complying with the agreement, if within prescribed time.<sup>69</sup> If denied the right, he may enforce it in equity, or recover damages on account of its refusal. Only parties to the agreement can claim interest in the new company unless interest is given them by the agreement.<sup>70</sup> In New York the time for coming in is limited by statute to six months.<sup>71</sup> Bondholders who had an opportunity to purchase and neglected to do so,<sup>72</sup> or who, with notice of the facts, have approved a plan of reorganization,<sup>73</sup> or who surrender their bonds to the trustees, taking stock and bonds, in pursuance of a plan for foreclosure and sale, in order to form a new company, can not, in the absence of fraud, be heard to interpose any objection to the proceedings.<sup>74</sup> The bare fact that some of the trustees are holders of bonds secured by their trust, is not sufficient of itself to make them incompetent to consent to a decree of foreclosure, embodying a plan for reorganization.<sup>75</sup> “A plan of reorganization made by railroad bondholders for the purpose of purchasing the property at foreclosure sale, and by which the stockholders in the old company are permitted to convert their stock into stock in the new company on payment of a stipulated difference, is not for that reason fraudulent and void as to general creditors of the old company, where it does not appear that any

<sup>68</sup> *Sage v. Central R. Co.*, 99 U. S. 334.

<sup>71</sup> 3 N. Y. Laws of 1890, ch. 564.

<sup>69</sup> *Vide supra*, § 1201; *Landis v. Western*, etc. R. Co., 123 Pa. St. 579; *Bound v. South Carolina R. Co.* (C. C. A.), 78 Fed. 49; *Thornton v. Wabash R. Co.*, 81 N. Y. 462.

<sup>72</sup> *Twin Lake Oil Co. v. Marbury*, 91 U. S. 587; *Foster v. Mansfield*, etc. Co., 146 U. S. 88; *Bound v. South Carolina R. Co.* (C. C. A.), 78 Fed. 49; *Alsop v. Riker*, 155 U. S. 448; *Holland v. Cheshire R. Co.*, 151 Mass. 231; *Vatable v. New York, etc. Ry. Co.*, 96 N. Y. 49; *Credit Co. v. Arkansas Central R. Co.*, 15 Fed. Rep. 46.

<sup>70</sup> *Kelley v. Browning*, 113 Ala. 420, 21 South. 928; *Marié v. Garrison*, 83 N. Y. 14; *Cornell v. Utica*, etc. Co., 61 How. Pr. (N. Y.) 184; *Wetmore v. St. Paul*, etc. Co., 5 Dill. 531, 3 Fed. 177; *Harris v. Davis*, 44 Fed. 172; *Reading Trust Co. v. Reading Iron Works*, 137 Pa. St. 282; *Gates v. Boston*, etc. Co., 53 Conn. 333; *Berbell v. Lee*, 40 Fed. 40.

<sup>73</sup> *Matthews v. Murchison*, 15 Fed. Rep. 691.

<sup>74</sup> *Crawshay v. Soutter*, 6 Wall. 739.

<sup>75</sup> *Shaw v. Little Rock*, etc. R. Co. (1879), 100 U. S. 605.

of the stockholders, as such, were parties to the plan; that it caused, or in any manner affected, the foreclosure proceedings, or deprived the general creditors of any rights, so that whatever rights, if any, are secured to the stockholders are at the expense of the bondholders, and not of the unsecured creditors.<sup>76</sup> Fraud will not be presumed from the mere fact of participation by the stockholders in the foreclosure and sale and reorganization.<sup>77</sup> The general creditors of an insolvent railroad, foreclosed and reorganized, may hold the new company liable, where the stockholders of the old company exchange their stock, for stock in the new company.<sup>78</sup> Their equity in the assets of the old company becomes merged into the assets of the new corporation.<sup>79</sup> By Kentucky statutes, all the bondholders must be permitted to participate in a pool to buy in the property at foreclosure sale.<sup>80</sup> Objections to such a purchase will be overruled by the court unless they are presented promptly.<sup>81</sup>

**§ 1254. Pledgor of bonds taking part in reorganization.**—A pledgor of bonds, before default, may join in purchase at reorganization, independent of his obligation to the pledgee.<sup>82</sup> After default, the pledgee of bonds as collateral may use the pledge in a reorganization.<sup>83</sup> If the pledgor's debt is paid, and the pledgee, by withholding the bonds prevents their use by the pledgor in reorganization, he may recover damages measured by the value of the stock.<sup>84</sup> If the pledgee uses the pledged bonds in reorganization, and accepts new bonds or stock as substituted collateral, which becomes worthless, the pledgor is not thereby released from his debt.<sup>85</sup>

**§ 1255. Limited time for bondholders to join in the reorganization.**—Bondholders not joining in the reorganization within the time limited, are excluded therefrom and are only entitled to

<sup>76</sup> Farmers', etc. Co. v. Louisville, etc. Ry. (1900), 103 Fed. 110.

<sup>77</sup> Wenger v. Chicago, etc. R. R. (1902), 114 Fed. 34.

<sup>78</sup> Central Georgia Ry. v. Paul (1899), 93 Fed. 878; St. Louis T. Co. v. Des Moines, etc. Ry. (1900), 101 Fed. 632.

<sup>79</sup> Farmers' L. & T. Co. v. Central, etc. Ry. (1903), 120 Fed. 1006.

<sup>80</sup> Reed v. Schmidt (Ky. 1903), 72 S. W. 367.

<sup>81</sup> Carey v. Houston, etc. Ry.

(1892), 52 Fed. 671; Foster v. Mansfield, etc. R. R. (1892), 146 U. S. 88; Symmes v. Union Trust Co. (1894), 60 Fed. 830; Cutler v. Iowa, etc. Co. (1899), 96 Fed. 777.

<sup>82</sup> Brown v. Anderson (1898), 104 Ga. 30.

<sup>83</sup> Field v. Sibley (1902), 74 N. Y. App. Div. 81.

<sup>84</sup> Griggs v. Day (1899), 158 N. Y. 1.

<sup>85</sup> In re Lorillard (1901), 107 Fed. 677.

*pro rata* share of the proceeds of the sale in foreclosure. Where the committee of bondholders, by advertisement, kept open the invitation to bondholders, to join in the reorganization, until conveyance of the property by deed to the reorganized corporation, they can not come in later.<sup>86</sup> The bondholder must turn in, with the bonds detached, all coupons or the amount collected on them.<sup>87</sup> The agreement to plan to reorganize, is revocable until signed by all parties.<sup>88</sup>

**§ 1256. Powers of bondholders; reorganization committee.** The powers of the bondholders, and reorganization committee, and the agreement, are strictly construed.<sup>89</sup> A reorganization committee holding bonds and securities, as security for payment of liens, can not be compelled by the reorganized corporation, to deliver the security before making such payment.<sup>90</sup> The committee is not liable for mistakes, so long as it acts in good faith. Where the agreed plan of reorganization fails as impracticable, and the committee proceeds upon another plan; and certain bondholders after notice, fail to enter into it within the time limited, and thereby lose their interest therein, they can not hold the committee liable.<sup>91</sup> The reorganized corporation may intervene to present its own defense, in a suit brought against the committee by a creditor to enforce performance of certain acts provided by the reorganization agreement.<sup>92</sup> The members of the committee are trustees of the depositing bondholders or stockholders, and, as such fiduciaries are not allowed to make any secret profit in their position.<sup>93</sup> The committee is personally liable on its contracts, where its members do not disclose the fact that they are acting only as agents, or trustees for an undisclosed principal.<sup>94</sup> The trustees' certificates which are issued for bonds or stocks, deposited for

<sup>86</sup> Bound v. South Carolina R. R. (1897), 78 Fed. 49; Landis v. Western Pa. R. R. (1890), 133 Pa. St. 579.

<sup>87</sup> Fuller v. Venable (1902), 118 Fed. 543; Kelley v. Forty Second St. etc. R. R. (1899), 37 N. Y. App. Div. 500.

<sup>88</sup> Consolidated, etc. Co. v. Nash (1901), 109 Wis. 490; Abel v. Allemanit Bank (1900), 79 Minn. 419, 82 N. W. 680.

<sup>89</sup> United, etc. Co. v. Omaha, etc. Co. (1900), 164 N. Y. 41; Farmers', etc. Co. v. Centralia, etc. R. R. (1899), 96 Fed. 636; Lyman

v. Kansas City, etc. R. R. (1900), 101 Fed. 636.

<sup>90</sup> Peoria, etc. Ry. v. Coster (1899), 97 Fed. 519.

<sup>91</sup> Van Siclem v. Bartol (1899), 95 Fed. 79.

<sup>92</sup> Washington, etc. Bank v. Fletcher (1900), 55 N. Y. App. Div. 580.

<sup>93</sup> Haines v. Kinderhook, etc. Ry. (1898), 33 N. Y. App. Div. 154.

<sup>94</sup> McClure v. Central Trust Co. (1900), 165 N. Y. 108; Hanford v. Washington L. Ins. Co. (1893), 73 Hun, 448.

the owner's use in reorganization, are held to be the same as the securities themselves, and must be given up, upon demand for return of the securities.<sup>95</sup> Such certificates are not negotiable,<sup>96</sup> and are not subject to attachment by service upon the trustee, without also service upon the certificate holder.<sup>97</sup> They are not assignable without consent of the owner of the securities themselves.<sup>98</sup> Parties to a reorganization agreement, which is not enforced by reason of change of possession or character of the property, may recover damages.<sup>99</sup> Where the depositary of stocks or bonds, with authority to use them in reorganization, fails, the depositor may file a bill for accounting.<sup>1</sup>

**§ 1257. Reorganization under statutory regulations.**—Many of the States have by statute conferred upon reorganization corporations all the privileges and powers of the old company.<sup>2</sup> In the absence of any such statute, a railroad company that acquires the railroad and property of an insolvent railroad corporation, under its foreclosure and sale, succeeds only to its property and the right to operate the road, but does not, by the purchase, acquire any of its special privileges or franchises; as, for example it does not acquire an exemption which the old road enjoyed. The exemption was lost by dissolution of the old company.<sup>3</sup> Creditors who accept benefits by reason of an assignment made for the benefit of creditors, under a reorganization, are thereby estopped to complain of the release of the stockholders from liability to creditors of the old company.<sup>4</sup> In England there is no foreclosure of railroad mortgages. Reorganization of corporations there, is statutory only.<sup>5</sup> A holder in New York, of stock in an English corporation, may be assessed upon his stock though fully paid up, where under the statute it would be assessable in Eng-

<sup>95</sup> Bean v. American L. & T. Co. (1890), 122 N. Y. 622; Cassagne v. Narvin (1894), 143 N. Y. 292; Jenkins v. John Good, etc. Co. (1900), 56 N. Y. Div. 573.

<sup>96</sup> Mercantile, etc. Co. v. Low (1898), 87 Fed. 241.

<sup>97</sup> Montgomery v. Dermott (1900), 103 Fed. 801.

<sup>98</sup> Hubbard v. Manhattan Trust Co. (1898), 87 Fed. 51.

<sup>99</sup> Cox v. Stokes (1898), 156 N. Y. 491; Turner v. Jackson (Tenn. 1899), 63 S. W. 511; Crown, etc. Co. v. Thomas (1898), 177 Ill. 534; Reading Trust Co. v. Reading

Iron Works (1891), 137 Pa. St. 282.

<sup>1</sup> Central Trust Co. v. Carter (1896), 78 Fed. 225; Garing v. Surgart (1898), 25 Colo. 136; Benedict v. Moore (1896), 76 Fed. 472.

<sup>2</sup> See Jones, Corporation, Bonds, etc., § 698.

<sup>3</sup> Keokuk, etc. R. R. v. Missouri (1894), 152 U. S. 301; Norfolk v. Pendleton (1895), 156 U. S. 667, 187 U. S. 258.

<sup>4</sup> Hunt v. Roosen (Minn. 1902), 91 N. W. 25.

<sup>5</sup> Cook on Corp. 889.

land.<sup>6</sup> The purchasers of corporate property, upon a foreclosure sale, are vested with rights in the property which are absolute as against the corporation and stockholders, all of whose interests are thereby barred;<sup>7</sup> but the conflicting interests are usually compromised, for the reasons stated in the preceding section, under a plan or scheme of reorganization which is in many States regulated by statute. What property and rights pass by sale and transfer of one corporation to another, or to a purchaser under foreclosure sale under a mortgage, depends upon the terms of the transfer or mortgage.<sup>8</sup> Contract rights under a continuing contract, will pass to a merely reorganized corporation, but not to one reincorporated.<sup>9</sup>

**§ 1258. The new corporation, when not a bona fide purchaser of assets of the old.**—A reorganized corporation, though purchasing at receiver's sale, is not a *bona fide* purchaser without notice, where it has the same officers as the old corporation.<sup>10</sup> The reorganized corporation was held to be a *bona fide* purchaser for value, where it gave its capital stock in exchange for the property of the corporation sold by the receiver in foreclosure of its mortgage, at a suit promoted by one of its officers, who was owner of majority of the capital stock, also a creditor of the company. He purchased at the sale at a nominal figure, and transferred the property to the reorganized corporation in exchange for its capital stock.<sup>11</sup> As to judgment creditors of an insolvent corporation a reorganization company is not a *bona fide* purchaser of the foreclosed property transferred to it.<sup>12</sup>

**§ 1259. Liability of the new corporation, for debts and torts of the old.**—The debts, liabilities, contracts and torts of the old company are not necessarily assumed by the purchaser.<sup>13</sup> The

<sup>6</sup> *Giesen v. London, etc.* (1900), 102 Fed. 584. *Per contra*, *Bank of China v. Morse* (1901), 168 N. Y. 458, 61 N. E. 774, 56 L. R. A. 189; 85 Am. St. Rep. 675.

<sup>7</sup> *Vatable v. New York, etc. R. Co.*, 96 N. Y. 56.

<sup>8</sup> *Swift v. Smith*, 65 Md. 428, 57 Am. Rep. 336; *Louisville Banking Co. v. Eisenman*, 94 Ky. 83, 42 Am. St. Rep. 335; *Button v. Hoffman*, 61 Wis. 20, 50 Am. Rep. 131;

*First National Bank, etc. v. Winchester*, 119 Ala. 168, 72 Am. St. Rep. 904; *Armington v. Palmer*, 21 R. I. 109, 43 L. R. A. 95, 79 Am.

St. Rep. 786.

<sup>9</sup> *Combes v. Keyes*, 89 Wis. 297, 46 Am. St. Rep. 839, 27 L. R. A. 369; *Canal, etc. Co. v. St. Charles, etc. Co.*, 44 La. Ann. 1069; *Houston v. Jefferson College*, 63 Pa. St. 428; *Marietta's Bank v. Sewall*, 50 Me. 220; *Taylor v. Holmes*, 14 Fed. 498; *Mumma v. Potomac*, 8 Peters, 281.

<sup>10</sup> *Oregon, etc. Co. v. Balfour* (1898), 90 Fed. 295.

<sup>11</sup> *Farmers', etc. Co. v. Pennsylvania, etc. Co.* (1900), 103 Fed. 132.

<sup>12</sup> *Frazer v. East Tennessee, etc. R. R.* (1889), 88 Tenn. 138.

<sup>13</sup> *Vide supra*, §§ 1287-1290, and

liabilities of a succeeding corporation, unless otherwise provided by statute,<sup>14</sup> are governed by the general rule that where one corporation which is not a mere continuation of another,<sup>15</sup> becomes *bona fide*,<sup>16</sup> the purchaser, directly or indirectly,<sup>17</sup> of the property and franchises of the other at execution,<sup>18</sup> foreclosure or other judicial sale,<sup>19</sup> such purchaser does not become liable for the debts unsecured by prior lien, or liable upon the contracts of the other corporation,<sup>20</sup> or for its negligence or other torts.<sup>21</sup> Thus, where a mortgage on the property and franchises of a corporation is foreclosed, and purchasers at the sale reorganize under the name of the original corporation, neither they nor the property become liable for its debts.<sup>22</sup> A foreclosure sale generally

<sup>23</sup> L. R. A. 231; St. Louis, etc. R. Co. v. Miller, 43 Ill. 199; Memphis Water Co. v. Majeus, 15 Lea, 37; Cook v. Detroit, etc. Ry. Co., 43 Mich. 349.

<sup>14</sup> New Bedford R. Co. v. Old Colony R. Co., 120 Mass. 397; Plainview v. Winona, etc. R. Co., 36 Minn. 505; St. Louis, etc. R. Co. v. Miller, 43 Ill. 199; Desmond v. St. Louis, etc. Co., 77 Ill. 631; Memphis v. Magens, 15 Lea (Tenn.), 37; Welsh v. St. Paul, etc. R. Co., 25 Minn. 314.

<sup>15</sup> Johnston v. Crawley, 25 Ga. 316, 71 Am. Dec. 173; Chase v. Mich. etc. Co., 121 Mich. 631; Austin v. Tecumseh Nat. Bank, 49 Neb. 412, 35 L. R. A. 444, 59 Am. St. Rep. 543; Berry v. Kan. City, etc. Co., 52 Kan. 774, 39 Am. St. Rep. 381.

<sup>16</sup> Chicago, etc. Ry. Co. v. Third Nat. Bank, etc., 134 U. S. 276; Cole v. Millerton Iron Co., 133 N. Y. 164; Blanc v. Paymaster Min. Co., 95 Cal. 524, 29 Am. St. Rep. 149; Rogers v. New York, etc. Land Co., 134 N. Y. 197.

<sup>17</sup> Morgan County v. Thomas, 76 Ill. 120; Pennison, etc. Co. v. Chicago, etc. Co., 93 Wis. 344.

<sup>18</sup> Kittel v. Augusta, etc. R. Co., 78 Fed. 855; Gulf Col. etc. Co. v. Newell, 73 Tex. 534, 15 Am. St. Rep. 788.

<sup>19</sup> National Foundry, etc. v. Works v. Oconto, etc. Co., 105 Wis. 48; Midland Ry. Co. v. Fisher, 125

Ind. 19, 21 Am. St. Rep. 189; Wiggins Ferry Co. v. Ohio & M. Ry. Co., 142 U. S. 396; Moyer v. Fort Wayne, etc. Co., 132 Ind. 88.

<sup>20</sup> Chase v. Mich. T. Co., 121 Mich. 631; Austin v. Tecumseh Nat. Bank, 49 Neb. 412, 59 Am. St. Rep. 543, 35 L. R. A. 444.

<sup>21</sup> Ewing v. Composite Brake Shoe Co., 169 Mass. 72; Neff v. Wolf River Boom Co., 50 Wis. 585; Pittsburgh, etc. Co. v. Pierst, 96 Pa. St. 144.

<sup>22</sup> Memphis Water Co. v. Majeus, 15 Lea, 57. A plan of reorganization providing for the issue of second preferred income bonds of the new company at par (secured by a second mortgage) to the holders of the floating debt of the old company in place of their surrendered evidences of indebtedness, was sustained as against one of the holders of the floating debt charging that it was inequitable and seeking to have the stock of the new company provided in the agreement to be issued to the stockholders of the old company, placed in the hands of a receiver and sold, and the proceeds applied to the payment of his claim and of such other creditors as should come in and be made parties; the court saying, "it was the evident purpose of the parties to this agreement to place these floating-debt holders in at least as good a relation to the

cuts off all rights of creditors, to follow the property.<sup>23</sup> And it is held that even when it is provided by statute, or by the mortgage, that the stockholders of the old company may obtain an interest in the new, the latter is not thereby made liable for the former's debts.<sup>24</sup> Neither is a new company, formed by the purchasers at foreclosure sale, liable on the contracts and torts of the former company.<sup>25</sup> Thus when the old company had bound itself by an agreement not to extend its railroad in a certain direction, the new corporation is not bound by this agreement, if its charter permits the extension.<sup>26</sup>

Cases holding that the reorgan-

new company as they bore to the old company. They got for their unsecured indebtedness something which at least bears the resemblance of a security. It was a second mortgage bond. . . . The plan adopted had what seems to have been a due and equitable regard to the interests of all classes of creditors and stockholders, and it does not seem that upon the statements in this bill any injustice was intended or has been done to this creditor." *Hancock v. Toledo, etc. R. Co.*, 9 Fed. Rep. 738, 742. Where an order of court made the purchase price of rolling stock bought by its receiver a first lien "upon the mortgaged premises," although it also authorized its payment out of the proceeds of sale, it was held that, there being no proceeds of sale, the mortgage bondholders having bought in the property by surrendering their bonds, the purchasers could claim to have the premises discharged from the lien. And it was said "if the purchasers on the sale, whether bondholders or third persons, had paid the purchase-money in cash or secured its payment, there would, we conceive, be no doubt that the lien would be transferred to the proceeds. There would then be a substitute for the thing sold, upon which the lien would attach, relieving the land in the hands of the purchasers. But it could not have been the intention of the

court to make a constructive payment on a purchase by the mortgagees, through a cancellation of the mortgage debt, equivalent to an actual payment, so as to relieve the property from the charge." *Villas v. Page*, 106 N. Y. 439, 454, 455; *Greenell v. Detroit Gas Co.*, 112 Mich. 70; *Stewart's Appeal*, 72 Pa. St. 291; *Goddard v. Fishel, etc. Co.*, 9 Colo. App. 306, 48 Pac. 279; *Warfield v. Marshall County Canning Co.*, 72 Iowa, 666, 2 Am. St. Rep. 263.

<sup>23</sup> *Stewart's Appeal*, 72 Pa. St. 291; *Warfield v. Marshall County, etc. Co.*, 72 Iowa, 666, 2 Am. St. Rep. 263.

<sup>24</sup> *Sullivan v. Portland, etc. R. Co.*, 94 U. S. 806; *Smith v. Chicago, etc. R. Co.*, 18 Wis. 17; *Marshall v. Western North Carolina R. Co.*, 92 N. C. 331. See, however, *University v. Moody*, 62 Ala. 389; *Francklyn v. Sprague*, 121 U. S. 215; *Stewart's Appeal*, 72 Pa. St. 291; *Chase v. Mich. T. Co.*, 121 Mich. 631; *Pennison, etc. Co. v. Chicago, etc. Ry. Co.*, 93 Wis. 344.

<sup>25</sup> *Metz v. Buffalo, etc. R. Co.*, 58 N. Y. 61, 17 Am. Rep. 201; *Pittsburgh, etc. R. Co. v. Fierst*, 96 Pa. St. 144; *Secombe v. Milwaukee, etc. R. Co.*, 2 Dill. 469; *Hopkins v. St. Paul, etc. R. Co.*, 2 Dill. 396, 17 Am. Rep. 201; *Wellsborough, etc. Plank Road Co. v. Griffin*, 47 Pa. St. 417.

<sup>26</sup> *City of Menasha v. Milwaukee, etc. R. Co.*, 52 Wis. 420.

ized company is not liable upon the contracts and obligations of its predecessor, are usually those in which the reorganization has resulted from foreclosure proceedings by which all equities have been quieted; and the rule does not apply where the sale has been decreed subject to existing liens, nor where the purchasers at foreclosure sale have taken with knowledge of incumbrances.<sup>27</sup>

*Bona fide purchaser.* *Rights of creditors.*—In case of such sale of all the property of a corporation to another, in fraud of its creditors, their right to follow the property, in equity, or in some States, at law, is superior to the rights of any person not a *bona fide* purchaser,<sup>28</sup> or mortgagee with notice,<sup>29</sup> or stockholder of the purchasing corporation, receiving his stock in consideration of claim as creditor of the old corporation.<sup>30</sup> The rule, that the reorganized corporation is not responsible for the debts of the old corporation, does not apply where the property of the old company has been otherwise acquired than in foreclosure proceedings. In the latter event, it may still be reached by creditors of the former owner, although it has passed into the hands of a reorganized company,<sup>31</sup> and the new company may still be liable

<sup>27</sup> Swanson v. Wright, 110 U. S. 590; Williams v. Morgan, 111 U. S. 679; Vilas v. Page (1887), 106 N. Y. 439; Commonwealth v. Susquehanna, etc. R. Co. (Pa. 1888), 4 Ry. & Corp. L. J. 570.

<sup>28</sup> Montgomery, etc. R. Co. v. Branch, 59 Ala. 139; Cole v. Millerton Iron Co., 133 N. Y. 164, 28 Am. St. Rep. 615.

<sup>29</sup> Blair v. St. Louis, etc. Co., 24 Fed. 148.

<sup>30</sup> Montgomery Webb Co. v. Dienelt, 133 Pa. St. 585, 19 Am. St. Rep. 663.

<sup>31</sup> Marshall v. Western North Carolina R. Co., 92 N. C. 322; Brum v. Merchants' Mut. Ins. Co., 16 Fed. Rep. 140; City of Menasha v. Milwaukee, etc. R. Co., 52 Wis. 420. Cf. Child v. New York, etc. R. Co., 129 Mass. 170; Welfley v. Shenandoah, etc. Co., 83 Va. 768, holding that a mere change of name does not constitute a new company; Marshall v. Western North Carolina R. Co., 92 N. C. 322, holding that where there is in effect an organization of a new

company a retention of the old name is immaterial. An agricultural society whose object, according to its constitution, was "to improve the condition of agriculture, horticulture, and the mechanic and household arts," was reorganized into a joint-stock company, "to improve the condition of agriculture, horticulture, floriculture, mechanic and household arts," the name being changed only by substituting the word "board" for "society." The old society provided for holding annual fairs, and the new for annual fairs and exhibitions. It was held that there was no substantial change in the objects of the society; and the new one, continuing still a public institution, was liable only to the extent of its corporate property. Livingston County Agricultural Society v. Hunter, 110 Ill. 155. Where an insolvent banking corporation transfers all its assets, including its name and franchise, to a new association, under an agreement

upon the contracts of the old.<sup>32</sup> Thus, where several corporations are united in one, and the property of the old companies is vested in the new, the latter is liable both at law and in equity for the debts of the former, at least to the extent of the property received from them, the remedy at law not being exclusive.<sup>33</sup> Again, the conversion of a trading company acting as a corporation *de facto*, into one *de jure*, will not exempt the property held in the latter character from liability to the obligations in the former.<sup>34</sup> In a Michigan case in point, a company whose members supposed themselves to be incorporated, issued paper in its corporate name, but afterwards finding that they were not properly organized, dissolved; and were legally incorporated under a different name, and it was held that the new company could not repudiate the paper.<sup>35</sup> Also, in a case in Louisiana, it was held that the stockholders of a corporation, in the name of which property has been bought on credit, can not form a new corporation in which their interests are the same as in the old, and based on no new con-

by which the latter is to pay a composition agreed on by the former with most of its creditors, but is to be repaid any amount in excess of the composition rate which it may be obliged to pay to the non-assenting creditors, and such new association assumes the name of, and carries on the banking business in the office theretofore occupied by the old association, and claims its franchise and uses its seal, there is mere change of membership, and not a new corporation, and the new corporation is liable to creditors who did not accept the composition. Island City Sav. Bank v. Sachtleben, 67 Tex. 420.

<sup>32</sup> Ruttan v. Union Pacific R. Co., 17 Fed. Rep. 480. An insurance company being in embarrassed circumstances, a plan of reorganization was determined upon, and a new company was formed, which agreed to lend defendants, who were stockholders in the old company, ten thousand dollars to pay off its debts; and thereupon the defendants executed a bond to indemnify the new com-

pany against loss on account of the liabilities of the old company, and bound themselves to pay off any losses to the extent of sums unpaid on their subscriptions to stock. It was held that there was sufficient consideration to support the bond, and that although the company was organized on the mutual plan, yet the charter providing that, for the better security of policy-holders, the company may add thereto a guaranty or stock capital, not exceeding two hundred thousand dollars, this bond is to be considered as a guaranty, under this provision, for the payment of the debts and liabilities of the old company by the defendants, to the extent of amounts unpaid on their subscriptions to stock. Planters' Ins. Co. v. Wicks (Tenn. 1887), 4 S. W. Rep. 172,

<sup>33</sup> Harrison v. Arkansas Valley Ry. Co., 4 McCrary C. Ct. 264.

<sup>34</sup> Georgia Ice Co. v. Porter, 70 Ga. 637.

<sup>35</sup> Empire Manuf. Co. v. Stuart, 46 Mich. 482.

sideration, and, by transferring the property to the new corporation, escape liability to the vendor and creditors to the value of the party.<sup>36</sup>

**§ 1260. Liability of the old corporation.**—The sale of all its property under execution, foreclosure of mortgage, or other judicial sale, does not thereby dissolve the corporation, unless under statutory provision; and, notwithstanding such sale, the corporation continues liable for its debts, contracts and torts.<sup>37</sup>

**§ 1261. Change of State bank to National bank.**—The National Banking Act of Congress provides for reorganization of State banking institutions into national banks, by action of the directors, under authority of the owners of two-thirds of the capital stock of any such banking institution, organized under general or special law of any State or territory of the United States.<sup>38</sup> No other authority, than that of the act of Congress, is requisite for such reorganization.<sup>39</sup> A certificate of the Comptroller of the currency is conclusive of the regularity of the proceedings.<sup>40</sup>

*Effect of the change* is not to newly incorporate, but only to continue the old corporation under a new jurisdiction.<sup>41</sup> “The general scheme of the National Banking act, is that State banks may avail themselves of its privileges and subject themselves to its liabilities, without abandoning their corporate existence, without any change in the organization, officers, stockholders, or property, and without interruption of their pending business or contracts. All property and rights, which they held before organizing as national banks, are continued to be vested in them under their new *status*. . . . Although, in form, their property and rights, as State banks, purport to be transferred to them in their new *status* of national banks, yet in substance there is no actual transfer from one body to another, but a continuation of the same body, under a changed jurisdiction. As between the bank and those who have contracted with it, it retains its identity, notwithstanding its acceptance of the privilege of organizing un-

<sup>36</sup> Hancock v. Holbrook (1888), 40 La. Ann. 53.

<sup>37</sup> United States v. Little Miami, etc. Co., 1 Fed. 700; Sleeper v. Goodwin, 67 Wis. 577. *Vide supra*, § 1288, DEBTS OF THE OLD CORPORATION.

<sup>38</sup> Rev. Stat. U. S., § 5154; Thomas v. Farmers' Bank of Md., 46 Md. 43.

<sup>39</sup> Casey v. Galli, 94 U. S. 673.

<sup>40</sup> Keyser v. Hitz, 2 Mackey (D. C.), 473, 133 U. S. 138.

<sup>41</sup> Michigan Ins. Bank v. Eldred, 143 U. S. 293; Metropolitan Nat. Bank v. Claggett, 141 U. S. 520; Coffey v. Nat. Bank of Mo., 46 Mo. 140, 2 Am. Rep. 153, 488; Thorp v. Wegeforth, 56 Pa. St. 82, 93 Am. Dec. 789.

der the National Banking act."<sup>42</sup> As a national bank, it succeeds to all the assets of the State bank,<sup>43</sup> and its contracts and rights of action,<sup>44</sup> and it continues to be liable for its debts and executory contracts and torts, for which it was responsible as a State bank.<sup>45</sup> As a national bank, its franchises and privileges are not derived from the State, and it is not liable for a *bonus* imposed by the State, on account of those privileges.<sup>46</sup>

<sup>42</sup> City Nat. Bank, etc. v. Phelps, 97 N. Y. 44, 49 Am. Rep. 513.

Y. 44, 49 Am. Rep. 513; Mich. Ins. Bank v. Eldred, 143 U. S. 293.

<sup>43</sup> Grocers' Nat. Bank v. Clark, 48 Barb. (N. Y.) 26; Western Reserve Bank v. McIntire, 40 Ohio St. 528.

<sup>45</sup> Kelsey v. National Bank, etc., 69 Pa. St. 426; Coffey v. Nat. Bank of Mo., 46 Mo. 140, 2 Am. Rep. 153, 488; Metropolitan Nat. Bank v. Claggett, 141 U. S. 520.

<sup>44</sup> Schofield v. State Nat. etc., 9 Neb. 316, 31 Am. Rep. 412; City Nat. Bank, etc. v. Phelps, 97 N.

<sup>46</sup> State v. Nat. Bank of Baltimore, 133 Md. 75.

## CHAPTER LIII.

### CONSOLIDATION OF CORPORATIONS.

<p>§ 1262. Consolidation defined. Amalgamation, merger.</p> <p>1263. What amounts to consolidation. Lease. Purchase.</p> <p>1264. Agreement to consolidate.</p> <p>1265. Public policy as to consolidation.</p> <p>1266. Power of legislature to authorize consolidation.</p> <p>1267. Legislative authority requisite.</p> <p>1268. Authority conferred by charter or statute.</p> <p>1269. Consent of shareholders to consolidate.</p> <p>1270. Payment for dissenting stock, upon appraisement.</p> <p>1271. Rights of dissenting stockholders.</p> <p>1272. Enjoining unauthorized consolidation.</p> <p>1273. Whether consolidation works dissolution of the old company.</p> <p>1274. Pending suits, how affected.</p> <p>1275. Consolidation of parallel or competing railroads, prohibited.</p>	<p>§ 1277. Consolidation of interstate corporations.</p> <p>1278. <i>Status</i> of interstate consolidated corporations.</p> <p>1279. Powers and duties of interstate companies. Insolvency. Liens. Receivers.</p> <p>1280. Proof of consolidation.</p> <p>1281. <i>Status</i> of holders of the old stock.</p> <p>1282. Exchange of new stock for old.</p> <p>1283. Rights of consolidated companies.</p> <p>1284. Consolidation after municipal aid is voted.</p> <p>1285. Rights of new company to the properties of the old.</p> <p>1286. Duties of the new company to the public. Rates. Eminent domain.</p> <p>1287. Liabilities of the new company.</p> <p>1288. Debts of the old companies.</p> <p>1289. Contract obligations of the companies.</p> <p>1290. Mortgage debts and liens.</p> <p>1291. Judgments against the new company. Exemption from taxation.</p>
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#### References:

- Reincorporation and reorganization, Sections 1246-1261.
- Transfer of property to the new corporation. Section 1202.
- Whether franchises and exemptions pass. Section 1203.
- Rights and liabilities of the new company. Sections 1285-1291.
- Trusts formed by consolidation of corporations. Section 936a.

**§ 1262. Consolidation defined. Amalgamation, merger.**—The word “consolidation” is used to denote “any conjunction or union of the stock, property or franchises, of two or more cor-

porations, whereby the conduct of their affairs is permanently, or for a long period of time, placed under one management, whether the agreement between them be by lease, sale or other form of contract, and whether its effect be the dissolution of neither of the companies, or whether one of them be dissolved and its existence be merged in the corporate being of the other, or—whether it result in the dissolution of both companies and the creation of a new corporation out of such portions of the original companies as enter into the new.”<sup>1</sup> “When the rights, franchises, and effects of two or more corporations are, by legal authority and agreement of the parties, combined and united into one whole, and committed to a single corporation, the stockholders of which are composed of those (so far as they choose to become such) of the companies thus agreeing, this is in law, and according to common understanding, a consolidation of such companies; whether such single corporation, called the consolidated company, be a new one then created, or one of the original companies, continuing in existence with only larger rights capacities and property.”<sup>2</sup>

*In England.*—In England the term amalgamation is used instead of consolidation; and an amalgamation is assumed to be, where the existing companies agree to abandon their respective articles of association and regulations, and to register themselves under new articles as one body. This would be a new company, formed by the coalition or amalgamation of the companies previously existing.<sup>3</sup> Some difficulty, which the English courts had with the name amalgamation, was really an effort to make the substance of the thing itself comport with the ordinary principles of law applicable to the liability of the stockholders, and the payment of creditors of the companies amalgamated. In one case the court said, that on general principles two companies may be united either by fusion into a third, or by one absorbing the other; that the former process seems to correspond most nearly with the popular sense of the word amalgamation, but that nobody really knows what amalgamation means. Whatever be the process, however, no shareholder in the company which it destroys, or of which it suspends the life, can become a shareholder in the other company

<sup>1</sup> Beach on Railways, § 535.

cial Co., L. R. 4 Ch. App. 117;

<sup>2</sup> Meyer v. Johnston, 64 Ala. 603, 656.

*In re Empire Assur. Co.*, 28 Law T. (N. S.) 62 L. R. etc. L. R. 4 Eq. 341.

<sup>3</sup> *In re Bank of Hindustan*, 2 Henr. & M. 666; Clinch v. Finan-

without his personal assent.<sup>4</sup> In another case it was said, that if amalgamation was to be considered as meaning the power of transferring the whole business of one company to another—in other words, the annihilation of the lessor company—in which the shareholders in the one company were to be compelled to participate in the liabilities of that company, however different their objects,—it might be contended that a member of an insurance company might be compelled against his will, to become a member of a loan, guaranty, or other speculative company.<sup>5</sup> It has been held in England that when two companies amalgamate, the shareholders of each become the shareholders and partners in another company.<sup>6</sup>

<sup>4</sup> Dougan's Case (1873), 28 L. T. N. S. 60. Nobody, said Lord Westbury, uses the word amalgamation with any definite meaning, and the word which his lordship has suggested to replace it, the word which will best express the peculiar process by which one joint stock company endeavors, usually with indifferent success, to put an end, as far as it can, to its own existence, is a "welding," a word which necessarily implies the rule of law that one company can not so sink its existence in that of another, can not so vanish into thin air and leave its creditors going blankly into space, as under the guise of amalgamation it will endeavor to do; that its existence must necessarily continue until its liabilities have been discharged, until every creditor who is interested in the prolongation of its existence has received that satisfaction which he is entitled to demand. Blundell's Case, 17 Sol. J. & Rep. 87, 362.

<sup>5</sup> *In re Empire Assur. Co.*, 16 L. T. N. S. 346. The case was this: The articles of association of an insurance company contained a clause empowering the directors, with the consent of an extraordinary general meeting, "to transfer and sell the business of the company, or purchase or amalgama-

mate with the business of any other company of like nature." This company sold itself to a company whose business it was to purchase the business of other assurance companies; to carry on the business of fire and life assurance, and that of a loan company; to guaranty fidelity; to advance money on houses, and to purchase lands. Afterwards the purchasing company was wound up and some shareholders of the selling company were placed upon the list of contributaries of the amalgamated companies. They objected that the sale or amalgamation was invalid, being *ultra vires*, the business not being of the like nature, and therefore that they were shareholders in the former company only, which was still in real existence. The court so held and remarked that it was difficult to define exactly the meaning of the term "amalgamation," but that it was not sufficiently potent to compel a shareholder in one company to enter upon all the liabilities of another company totally different in its objects. It could not make a man a partner in a concern of the objects of which he was totally ignorant, and which he had never consented to join.

<sup>6</sup> Drew's Case, 16 L. T. N. S. 657.

*In the United States* it has been held that where several railroad companies were, by virtue of the act of union, "merged in and constituted one body corporate" under the name of one of them, and all were continued in existence, it was to be a consolidation; but that where by the very terms of the statute and the deed, the first corporation was extinguished, and the second only continued to exist,—the case was not one of mere consolidation or amalgamation.<sup>7</sup> An unincorporated masonic lodge, in existence before the organization of its members into a corporation of the same name, is not merged into the latter. Even an absolute identity of membership would not of itself lead to any such result. The same persons may be members in the same, or different proportionate interests, of as many distinct bodies, incorporated and unincorporated, as they choose to organize.<sup>8</sup> The word consolidate in a constitutional prohibition applying to parallel and competing lines, is used in the sense of join or unite, and the law is not to be evaded by the substitution of a lease for a deed of conveyance.<sup>9</sup> Consolidation generally implies "a surrender of the old charters by the companies, the acceptance thereof by the legislature, and the formation of a new corporation, out of such portions of the old as enter into the new."<sup>10</sup>

§ 1263. What amounts to consolidation, lease, purchase.—A lease may amount to a consolidation,<sup>11</sup> and consolidations have frequently taken the form of purchases by one corporation of the shares of another.<sup>12</sup> In Indiana, a railroad company, having power to consolidate with connecting or intersecting lines, may, under the statute, with a view thereto and to carrying out the object for which it was created, purchase the stock of such other road.<sup>13</sup> There is moreover nothing fraudulent in railroad companies combining to purchase another road which must go to sale.<sup>14</sup> Where the consolidation has taken the form of a sale

<sup>7</sup> Powell v. North Missouri R. Co., 42 Mo. 63; Chicago, etc. Co. v. Ashling, 160 Ill. 373.

<sup>8</sup> Mason v. Finch (1873), 28 Mich. 282.

<sup>9</sup> State v. Atchison, etc. R. Co. (1888), 24 Neb. 143, 4 Ry. & Corp. L. J. 86, 91.

<sup>10</sup> State v. Bailey, 16 Ind. 46, 61, 79 Am. Dec. 405, citing Lau-man v. Lebanon Valley R. Co., 30 Pa. St. 742, 72 Am. Dec. 685. Cf. McMahan v. Morrison, 16 Ind. 172,

79 Am. Dec. 418. See Clearwater v. Meredith, 1 Wall. 25, 40.

<sup>11</sup> State v. Atchison, etc. R. Co. (1888), 24 Neb. 143, 4 Ry. & Corp. L. J. 86, 91.

<sup>12</sup> Central, etc. R. Co. v. Georgia (1875), 92 U. S. 665; Hill v. Nisbet, 100 Ind. 341; Eaton, etc. R. Co. v. Hunt, 20 Ind. 457, 462.

<sup>13</sup> Hill v. Nisbet, 100 Ind. 341.

<sup>14</sup> St. Louis, etc. R. Co., 69 Mo. 224, 256; Williamson v. New Jersey Southern R. Co., 26 N. J. Eq. 398.

and purchase, like any other sale, it can not be rescinded without restoring the consideration or purchase price.<sup>15</sup> A mere voluntary union, without the authorization of the legislature, does not constitute an amalgamation;<sup>16</sup> neither does a mere alliance with respect to traffic amount to an amalgamation.<sup>17</sup> Accordingly, traffic arrangements without legislative authority are nevertheless legal.<sup>18</sup> A temporary co-operation under one management is not a consolidation.<sup>19</sup> And a traffic agreement involving a joint management, has been enforced.<sup>20</sup> And, generally, a railway company allying itself with another does not thereby become equitably amalgamated with it. An agreement to amalgamate, as from time past, may possibly, in equity, amount to amalgamation; but an agreement to do so at a future period, will not so operate until that time arrives.<sup>21</sup>

<sup>15</sup> Buford v. Keokuk, etc. Co., 69 Mo. 611, affirming 3 Mo. App. 159.

<sup>16</sup> Shrewsbury, etc. R. Co. v. Stour Valley Co., 2 De Gex, M. & G. 866, 21 Eng. Law & Eq. 628.

<sup>17</sup> Shrewsbury, etc. Ry. Co. v. Stour Valley Ry. Co., 2 De Gex, M. & G. 866; Midland Great Western Ry. Co. v. Leech, 3 H. L. Cas. 872.

<sup>18</sup> Hart v. Renselaer, etc. R. Co., 8 N. Y. 37; Stratton v. New York, etc. R. Co., 2 E. D. Smith, 184.

<sup>19</sup> Archer v. Terre Haute, etc. R. Co. 102 Ill. 503, 7 Am. & Eng. R. R. Cas. 249.

<sup>20</sup> In a recent case the plaintiff, a New Hampshire corporation operating a railroad from N. to L., and the defendant, a Massachusetts corporation operating a road from L. to B., in the latter state, entered into a joint traffic agreement providing that the two roads were to be operated as a single road, under a joint management; that the property of each party should be kept in the same relative condition as at the time of the making of the agreement, at their joint expense; that plaintiff should erect, at his own expense, a freight depot at L., and defendant, at its own expense, a passenger depot at B.; that build-

ings destroyed by fire should be restored by the owner at his own cost; and that the interest upon the debts contracted by either party should be paid out of his own share of the net income; and it was decided that a passenger depot at B., in addition to the one provided for in the agreement, having become necessary to retain the increased business of the joint management, the directors of plaintiff had power to agree that the interest on expenditures made by defendant in the erection of the additional depot should be charged as a part of the operating expenses of the joint management. But defendant, without authority from the stockholders or directors of plaintiff, could not charge, as part of such operating expenses, interest or expenditures made by defendant in purchasing a controlling interest in the stock of the branch roads which it had leased, and which were being operated by the joint management. Nashua, etc. R. Co. v. Boston R. Co. (1890), 10 Sup. Ct. Rep. 1004, reversing 8 Fed. Rep. 458.

<sup>21</sup> Shrewsbury, etc. Ry. Co. v. Stour Valley Ry. Co., 2 De G., M. & G. 866.

*Purchase distinguished from consolidation.*—The mere purchase by one corporation of the franchises and property of another at foreclosure sale or otherwise, does not work a consolidation of the corporation, unless otherwise provided by statute.<sup>22</sup> But consolidation is effected by the purchase of all the property and franchises of one corporation by another, where the stock of the vendor corporation is issued to the shareholders of the vendee corporation in exchange for its shares.<sup>23</sup>

**§ 1264. Agreement to consolidate. Legislative authority.**—The steps necessary to effect a consolidation must of course be prescribed by statute; and the statutes generally prescribe: 1. An agreement between the corporations intending to consolidate. 2. Ratification by a certain majority, generally two-thirds, of the stockholders of the corporation, at a duly notified meeting for that purpose. 3. The articles of consolidation thus ratified, properly authenticated, are filed with the Secretary of State, which are thereafter evidence in all courts of the consolidation.<sup>24</sup> The essential steps prescribed by the statute to effect the consolidation, are conditions precedent, and must be performed, or the new company does not exist.<sup>25</sup> The New York statute, which is a codification of the law applying to business corporations, is probably the general law upon the subject. Any two or more corporations organized for the purpose of carrying on any kind of business of the same, or of a peculiar, nature, may consolidate such corporations into a single corporation, as follows: The respective boards of directors of such corporations may enter into and make an agreement, under their respective corporate seals, for the consolidation of such corporations, prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the number of directors who shall manage its affairs (not less than five nor more than thirteen), the names and post-office address of the directors for the first year, the term of its existence (not exceeding fifty years), the name of the town or

<sup>22</sup> Gulf, etc. Ry. Co. v. Newell, 73 Tex. 334, 15 Am. St. Rep. 788; Crane & Co. v. Fry (W. Va. 1903), 126 Fed. 278 (U. S. C. C. A.).

<sup>23</sup> Chicago, etc. Co. v. Ashling, 160 Ill. 373; Chicago, etc. Co. v. State, 153 Ind. 134; Rafferty v. Buffalo City Gas Co., 37 App. Div. (N. Y.) 618; Chicago, etc. Co. v. Ferguson (1903), 106 Ill. App. 356.

<sup>24</sup> S. D. Thompson in 31 Cent. L. J. 5.

<sup>25</sup> Commonwealth v. Atlantic, etc. R. Co., 53 Pa. St. 9; Peninsular R. Co. v. Tharp, 28 Mich. 506; Mansfield v. Drinker, 30 Mich. 124; Tuttle v. Michigan, etc. R. Co., 35 Mich. 247; Mansfield, etc. R. Co. v. Brown, 26 Ohio St. 223.

towns, county or counties, in which its operations are to be carried on, the name of the town or city and county in this State in which its principal place of business is to be situated, the amount of its capital stock (which shall not be larger in amount than the fair aggregate value of the property, franchises and rights of such corporations), and the number of shares into which the same is to be divided, the manner of distributing such capital stock among the holders thereof; and if such corporations or either of them shall have been organized for the purpose of carrying on any part of its business in any place out of this State (and such new corporations shall propose to carry on any part of its business out of this State), the agreement shall so state,—with such other particulars as they may deem necessary.<sup>28</sup> Although every consolidation must take place in consequence of two things, legislative authorization, and a contract between the corporations duly ratified by their shareholders, yet when it comes to the contract itself, a distinction must be carefully made between a consolidation and an agreement looking to a consolidation in the future.<sup>29</sup> The agreement to consolidate, required by the statute, shall be submitted to the stockholders of each of such corporations at a meeting thereof to be called upon notice of at least thirty days, specifying the time, place and object thereof, and addressed to each at their last known post-office address, and deposited in the post-office, postage prepaid, and published for at least three successive weeks in one of the newspapers in each of the counties of the State in which either of such corporations shall have its place of business, and, if such agreement shall be approved at each of such meetings of the respective stockholders separately (by the vote by ballot of the stockholders owning at least two-thirds of the stock), the same shall be the agreement of such corporations; and a sworn copy of the proceedings of such meetings, made by the secretaries thereof, respectively, and attached thereto, shall be presumptive evidence of the holding and action of such meetings.<sup>30</sup> Such agreement and verified copy of proceedings of such meetings shall be in duplicate, one of which shall be filed in the office of the Secretary of State, and the other in the office of the clerk of the county where the principal business office of the new corporation is to be situated in this State,—and thereupon such corporations shall be merged into the new corpo-

<sup>28</sup> N. Y. Laws 1890, ch. 567, § 13. Stour Valley R. Co., 2 De Gex, M.

<sup>29</sup> S. D. Thompson in 31 Cent. L. & G. 866, 21 Eng. Law & Eq. 628. J. 4; Shrewsbury, etc. R. Co. v. <sup>30</sup> N. Y. Laws 1890, ch. 567, § 14.

ration specified in such agreements, to be known by the corporate name therein mentioned, and the provisions of such agreement shall be carried into effect as therein provided.<sup>31</sup> The agreement to consolidate must strictly comply with the mode prescribed by the statute, otherwise there will not result even a *de facto* consolidation.<sup>32</sup> The agreement must be ratified by the stockholders at meeting duly called and held for the purpose.<sup>33</sup> A board of directors must be elected for the new corporation;<sup>34</sup> and the articles of agreement must be duly filed in the office of the Secretary of State, and published.<sup>35</sup> Under the Pennsylvania statute one railroad company may be formed by the consolidation of several, and constitute a legal incorporation by filing its certificate of consolidation with the Secretary of State.<sup>36</sup> This certificate must contain the recitals prescribed by law, or it will be ineffectual.<sup>37</sup> But where a consolidation is in other respects valid, it will not be declared void—simply from want of evidence, that a certified copy of a resolution (adopted by a majority of the stockholders of each company, and accepting the provisions of the act authorizing the consolidation), was filed with the Secretary of State,—or that the stockholders of the several companies held a meeting, except as is implied by the certified copy of the articles of agreement for consolidation filed in the secretary's office.<sup>38</sup> And where railroad companies (which have consolidated under statutes providing for the consolidation of railroads which will, when connected, form a continuous line of road), have complied with all the other provisions of the act, the consolidation is valid, though they may have failed to comply with that provision requiring each company to file with the Secretary of State a resolution accepting the provisions of the act. Such provision is merely directory.<sup>39</sup> Such condition precedent as the election of a new board of directors of the united company, must be strictly complied with.<sup>40</sup> A division

<sup>31</sup> N. Y. Laws 1890, ch. 567, § 14.

<sup>32</sup> Brown v. Dibbell, 65 Mich. 520; Mansfield, etc. Co. v. Stout, 26 Ohio St. 241.

<sup>33</sup> Bradford v. Frankfort, etc. Co., 142 Ind. 383.

<sup>34</sup> Mansfield, etc. Co. v. Drinker, 30 Mich. 124.

<sup>35</sup> Commonwealth v. Atlantic, etc. Co., 53 Pa. St. 9; Wells v. Rodgers, 60 Mich. 525.

<sup>36</sup> Commonwealth v. Atlantic, etc. Ry. Co., 53 Pa. St. 9.

<sup>37</sup> State v. Vanderbilt, 37 Ohio St. 590 (failing to state residence of directors).

<sup>38</sup> Leavenworth County v. Chicago, R. I. & P. Ry. Co., 25 Fed. Rep. 219.

<sup>39</sup> Leavenworth County v. Chicago, etc. Ry. Co. (1890), 10 Sup. Ct. Rep. 708; Mo. Laws, 1870, Adj. Sess., ch. 89.

<sup>40</sup> Mansfield, etc. R. Co. v. Drinker, 50 Mich. 124.

of the stock of a new consolidated company in exchange for the stock of the old companies, is not prohibited by the statutory prohibition to divide any part of the capital stock of corporations among stockholders.<sup>41</sup> Where a corporation was chartered to make and sell gas until a certain date, and some time before the charter expired, another corporation was chartered with similar privileges after the said date, it was contemplated that the latter corporation should make preparations before that date, and it was held, that a consolidation of the two corporations could be had on the day preceding that date.<sup>42</sup>

**§ 1265. Public policy as to consolidation.**—Where the law permits the consolidation of corporations, it is not against public policy for a corporation to be organized with the ulterior purpose of consolidating with another.<sup>43</sup> Thus, under the statutes of Indiana, railroad corporations may acquire by purchase, or consolidate with, other or intersecting lines; and the organization of a railroad corporation, with the view of ultimately consolidating upon equitable terms and in accordance with the provisions of the statute, with one already existing, is not against public policy.<sup>44</sup> So it has been said that, in view of the legislation of Illinois, great liberality is exercised in regard to contracts for consolidation between different railroad companies.<sup>45</sup> The language of the court was, that both by the legislation of the State and by the construction of the same by its highest court, great encouragement has been given to the union of lines of railroad for the purpose of having them operated under some general management, the result of which has been the consolidation of many lines of road which were originally separate and distinct, but which are now operated under

<sup>41</sup> The stockholders of two rival mining companies agreed to form a new company, to which should be conveyed all the property of both companies, in consideration of stock in the new company, to be divided *pro rata* among the old stockholders. The old companies were to be equally represented in the directory of the new. Before the stock was divided all creditors of the old companies were fully paid. A division of the stock among the stockholders was not prohibited by Civil Code Cal. § 309, providing that the directors of a corporation must not "di-

vide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock. . . . There may, however, be a division and distribution of the capital stock of any corporation, which remains after the payment of all its debts, upon its dissolution," etc. *Kohl v. Lilenthal* (1889), 81 Cal. 378.

<sup>42</sup> *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 600, reversing 4 Woods, 90.

<sup>43</sup> *Hill v. Nisbet*, 100 Ind. 341.

<sup>44</sup> *Hill v. Nisbet*, 100 Ind. 341.

<sup>45</sup> *Dimpfel v. Ohio, etc. R. Co.*, 8 Rep. 641.

a uniform system. It should be further observed that by the general language which has been used in legislation, authorizing the union and consolidation of many lines of road, the means by which the result is to be attained, have not been clearly designated, but have been left to be adjusted by contracts mutually executed between the parties. The public policy of the State of New York, as manifested by numerous acts of its legislature, has usually been not only to afford the fullest scope for the consolidation and reorganization of non-competing railroads and railroad corporations, but also for the transfer of the use of such roads and their franchises by one corporation to another.<sup>46</sup> Still, perhaps, it may be said that the public policy of most of the American Commonwealths is adverse to the consolidation of parallel or competing railways.<sup>47</sup> It has been argued that as the public has an interest in the proper administration of the powers conferred by the charter,<sup>48</sup> and as the comfort and safety of the railway may be seriously impaired, if the money supposed to be necessary for its maintenance and set apart therefor by the act of incorporation, be expended in other undertakings not contemplated when the act was obtained,—such a diversion of the corporate funds is illegal.<sup>49</sup> But this consideration seems more properly addressed to the question of the consent of shareholders. For, as a matter of fact, the comfort and safety of the public have been usually promoted by the consolidation of railways. Nevertheless, it is tenaciously held that a railroad can not, without the consent of the State, transfer to others the rights and powers conferred by its charter, and relieve itself of the duties which the grant imposes upon it.<sup>50</sup> And so, when a corporation like a railroad company has been granted a franchise intended in a large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the cor-

<sup>46</sup> Woodruff v. Erie Ry. Co., 93 N. Y. 609, 615, *per* Ruger, C. J.

<sup>47</sup> State v. Atchison, etc. R. Co., 24 Neb. 143, (1888) 4 Ry. & Corp. Law J. 86.

<sup>48</sup> East Anglian Ry. Co. v. Eastern Counties Ry. Co., 11 Com. B. 775.

<sup>49</sup> East Anglian Ry. Co. v. Eastern Counties Ry. Co., 11 Com. B. 775.

<sup>50</sup> Thomas v. Railroad Co., 101 U. S. 71; American Union Tel. Co.

v. Union Pac. Ry. Co., 1 McCrary, 188; Troy, etc. R. Co. v. Boston, etc. R. Co., 86 N. Y. 107; Abbott v. Johnstown, etc. R. Co., 80 N. Y. 27, 36 Am. Rep. 572; Middlesex R. Co. v. Boston, etc. R. Co., 115 Mass. 347; Stewart's Appeal, 56 Pa. St. 413; Wood v. Bedford, etc. R. Co., 8 Phila. 94; Tippecanoe County v. Lafayette, etc. R. Co., 50 Ind. 85; Winch v. Birkenhead, etc. Ry. Co., 5 De Gex & S. 562.

poration from performing those functions, is a violation of the contract with the State, and is void as against public policy.<sup>51</sup> As opposed to this statement of the ground of the rule against consolidation, there is much in the consolidation of railroads to commend itself to the public view of the case. The magnificent service that exists today in various parts of the country, such as fast through passenger trains, fast freight service, etc., could not have been perfected, if the original corporations still operated the railroads. If it were absolutely certain that no monopolistic conditions would be created, the ideal state would be reached in regard to the railroad service, if all the railroads of the country were under one general control. The consolidation of railroads tends to bring the standard of each of the integral parts to the highest level. No line is able, for any length of time, to maintain a radical difference in the character of the various portions of its road, Its own welfare necessitates uniformity in this regard, and the force of public opinion materially assists in that direction.<sup>52</sup>

*Trusts. Prohibition of consolidation by competing railroad lines.*—Some of the States, by statute, prohibit consolidation of competing railway lines.<sup>53</sup> Certain other States, by statute, authorize consolidation of continuous lines of connecting railroads.<sup>54</sup>

**§ 1266. Power of legislature to authorize.**—The power of the legislature to confer authority upon existing companies to consolidate or amalgamate—is unquestioned.<sup>55</sup> A State may authorize two or more existing corporations to organize themselves into a new corporation, just as it may authorize individuals to incorporate themselves.<sup>56</sup> But corporations are not such “persons” as

<sup>51</sup> Thomas v. Railroad Co., 101 U. S. 71; Peoria, etc. Ry. Co. v. Coal Valley Mfg. Co., 68 Ill. 489; Chambers v. Manchester, etc. Ry. Co., 5 Best & Sm. 588; London, etc. Ry. Co. v. London, etc. Ry. Co., 5 Jur. N. S. 801; McGregor v. Dover, etc. Ry. Co., 17 Jur. 21; East Anglian Ry. Co. v. Eastern Counties Ry. Co., 11 C. B. 775.

<sup>52</sup> J. N. Faithorn, letter to Hon. T. M. Cooley, 7 Ry. & Corp. L. J. 321, 323.

<sup>53</sup> *Vide supra*, § 936a, TRUSTS FORMED UNDER CONSOLIDATION OF CORPORATIONS; East Line, etc. Co.

v. State, 75 Tex. 434; Pearsall v. Great Northern R. Co., 161 U. S. 676.

<sup>54</sup> Mead v. New York, etc. Co., 45 Conn. 199; State v. Atchison, etc. R. R., 24 Neb. 143, 3 Am. St. Rep. 164; State v. Vanderbilt, 37 Ohio St. 590.

<sup>55</sup> Clearwater v. Meredith, 1 Wall. 39; Black v. Delaware, etc. Co., 22 N. J. Eq. 130, 24 N. J. Eq. 455; Clinch v. Financial Co., L. R. 5 Eq. 450.

<sup>56</sup> State Treasurer v. Auditor-General, 46 Mich. 224, 233.

are themselves authorized to form other corporations.<sup>57</sup> And a corporation manufacturing a lot of desks for another corporation, is not so connected in interest with it as to be an employe thereof.<sup>58</sup> The legislature may incorporate a new and distinct corporation out of two or more previously existing corporations, and its powers may be designated by reference to the charters of other companies as well as by special enumeration.<sup>59</sup> A statute authorizing consolidation of two corporations into a new corporation, is not held to limit the number to "two," but to intend to mean two or more corporations.<sup>60</sup> While the legislature can not ordinarily compel the consolidation of private corporations,<sup>61</sup> it may do so under a statute giving it power to alter, revoke or annul charters.<sup>62</sup> Furthermore, the legislature has power to validate defective consolidations, where it could have authorized them in the first instance.<sup>63</sup> Therefore defective consolidations may be validated by legislative recognition of the new corporation.<sup>64</sup> Conversely, the legislature may prohibit consolidation where the right at pleasure to alter, amend, or repeal the charter of a company, has been reserved.<sup>65</sup> The power to consolidate, given by a charter, however, is in the nature of a franchise or privilege, and is a contract between the corporation and the State, which can not be withdrawn by subsequent legislation, in the absence of a reservation of power to withdraw it, either in the particular charter or in the constitution or a general law.<sup>66</sup>

**§ 1267. Legislative authority requisite.**—As a corporation can not be created except by the legislature, so it can not, with-

<sup>57</sup> Factors,' etc. Ins. Co. v. New Harbor Protection Co., 37 La. Ann. 233.

<sup>58</sup> Dukes v. Love (1884), 97 Ind. 341.

<sup>59</sup> McMahan v. Morrison (1861), 16 Ind. 120, 79 Am. Dec. 418; Railroad Co. v. Maine, 96 U. S. 499; State v. Maine Cent. R. Co., 66 Me. 500.

<sup>60</sup> People v. Rice, 66 Hun (N. Y.), 130, 138 N. Y. 614.

<sup>61</sup> Mason v. Finch, 28 Mich. 282. Cf. Pennsylvania College Cases, 13 Wall. 190, 212.

<sup>62</sup> Pennsylvania College Cases, 13 Wall. 190.

<sup>63</sup> Mitchell v. Deeds, 49 Ill. 416, 419; Fisher v. Evansville, etc. R. Co., 17 Ind. 407, 413; Racine, etc.

R. Co. v. Farmers,' etc. Co., 49 Ill. 331.

<sup>64</sup> Meade v. New York, etc. R. Co., 45 Conn. 199; McCauley v. Columbus, etc. R. Co., 83 Ill. 348.

<sup>65</sup> The company's consent to a supplementary act prohibiting it from entering into any consolidation, combination, or contract with any other company in the same business is not necessary, and, if consent were necessary, the subsequent exercise of corporate functions is sufficient evidence of acceptance. Gibbs v. Consolidated Gas Co. (1889), 130 U. S. 396.

<sup>66</sup> Zimmer v. State, 30 Ark. 677. But see Adams v. Yazoo & Miss. V. R. Co., 77 Miss. 194, 24 So. 200.

out the authority of the legislature, merge its existence in that of another.<sup>67</sup> And railway companies, being chartered to perform public duties, can not evade their obligations to the public, by a transfer of their franchises, either by lease, sale or consolidation,—without express legislative sanction.<sup>68</sup> Therefore, where two

<sup>67</sup> "Consolidation of Corporations," by S. D. Thompson (1890), 31 Cent. L. J. 4; Hoadley v. County Comm'r's, 105 Mass. 526; Stowe v. Flagg, 72 Ill. 397; New York, etc. Canal Co. v. Fulton Bank, 7 Wend. 412; Pearce v. Madison, etc. R. Co., 20 How. 441; Clearwater v. Meredith, 1 Wall. 25, 39; State v. Bailey, 16 Ind. 46; *In re Era Ins. Soc.*, 9 Week. Rep. 67, 30 L. J. (N. S.) 137; Winch v. Birkenhead, etc. R. Co., 16 Jur. 1035, 1037. Mr. Taylor says the reasons why legislative authority is requisite are twofold: In the first place, since a consolidation ordinarily brings a new corporation into existence, the authority of the legislature is as necessary for the incorporation of a company out of pre-existing corporations as it is under other circumstances. And in the second place, the rights of dissenting shareholders would be impaired; for the implied agreement made by every one subscribing for shares, that the corporate affairs shall be subject to the will of the majority and of the corporate management, does not extend beyond the doing of acts contemplated in the original constitution. Taylor on Corporations, § 419; Kavanaugh v. Omaha Life Assn., 84 Fed. 295; American Loan, etc. Co. v. Minnesota, etc. Co., 157 Ill. 641, 42 N. E. 253; Greenville, etc. Co. v. Planters' etc. Co., 70 Miss. 669, 35 Am. St. Rep. 681; Lauman v. Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 695.

<sup>68</sup> Thomas v. Railroad Co., 101 U. S. 71; Pearce v. Madison, etc. R. Co., 21 How. 441; Pullan v. Cincinnati, etc. R. Co., 4 Biss. 35;

Mowrey v. Indianapolis, etc. R. Co., 4 Biss. 78; American Union Tel. Co. v. Union Pac. Ry. Co., 1 McCrary, 188; Troy, etc. R. Co. v. Boston, etc. R. Co., 86 N. Y. 107; Abbott v. Johnstown, etc. Horse R. Co., 80 N. Y. 27, 36 Am. Rep. 572, where it is said that like a special charter the right conferred under the general law is in the nature of a contract. It follows that upon principles of public policy and the ordinary rules of law applicable to contracts that the corporation cannot, without the consent of the other party, change its terms or absolve itself from its obligations to any conventional arrangement made with third persons as to the control and management of its road; Middlesex, etc. R. Co. v. Boston, etc. R. Co., 115 Mass. 347; Richardson v. Sibley, 11 Allen, 65, 87 Am. Dec. 700; Commonwealth v. Smith, 10 Allen, 448, 87 Am. Dec. 672; State v. Sherman, 22 Ohio St. 411, 428; Black v. Delaware, etc. Canal Co., 24 N. J. Eq. 456; Stewart's Appeal, 56 Pa. St. 413; Wood v. Bedford, etc. R. Co., 8 Phila. 94; Tippecanoe County v. Lafayette, etc. R. Co., 50 Ind. 85. "It is bound by reciprocal obligations to the state and on reciprocal duties to the public." Peoria, etc. Ry. Co. v. Coal Valley Manuf. Co., 68 Ill. 489, according to which case, when roads accept their charters, it is with the implied understanding that they will perform these duties to the public as common carriers of both persons and property, under the responsibility which that relation imposes. *Ex parte Williamson*, L. R. 5 Ch. 309; East Anglian Ry. Co. v. Eastern Counties Ry.

separate corporations are created to build railroads, they have no right, without authority, to unite and conduct their business under one management; nor have they the right to establish a steam-boat line to run in connection with them.<sup>69</sup> In the absence of authority clearly conferred, the amalgamation of companies, is an act beyond the scope of the powers, not only of the directors but of the company.<sup>70</sup> Where power is given by statute to one railroad company to consolidate with any other, whatever other corporation it selects for a union, has power to unite with it, although it be not named in the statute.<sup>71</sup> And after a consolidation is effected, the new company enjoys the same presumptions as to the rightfulness of its legal existence, as an original company.<sup>72</sup> The necessary consent of the legislature to consolidate, is usually given by general statute; or the agreement to consolidate may afterward be validated by the legislature,<sup>73</sup> or it may ratify an unauthorized consolidation so as to make the corporation *de jure*.<sup>74</sup> The right granted to a corporation to consolidate, is protected from repeal by the contract clause of the Federal Constitution, where such right has not been reserved.<sup>75</sup> Unless statutory formalities for consolidation are substantially complied with, the proceedings are nugatory.<sup>76</sup> The life of the consolidated company is limited to the shorter term of existence, where the unexpired terms of the companies differ, unless such shorter term is extended or renewed before its expiration.<sup>77</sup>

Co., 11 C. B. 775; Chambers v. Manchester, etc. Ry. Co., 5 Best & Smith, 588; Winch v. Birkenhead, etc. Ry. Co., 5 De Gex, & S. 562; McGregor v. Dover, etc. Ry. Co., 17 Jur. 21; London, etc. Ry. Co. v. London, etc. Ry. Co., 5 Jur. N. S. 801.

<sup>69</sup> Pearce v. Madison, etc. R. Co., 21 How. 441.

<sup>70</sup> Charleston v. Newcastle, etc. Ry. Co., 5 Jur. N. S. 1096; Blatchford v. Ross, 5 Abb. Pr. N. S. 434, 54 Barb. 42; Greenville, etc. Co. v. Planters', etc. Co., 70 Miss. 669, 35 Am. St. Rep. 681.

<sup>71</sup> *In re Prospect Park*, etc. R. Co., 67 N. Y. 371; Mitchell v. Deeds, 49 Ill. 416, 95 Am. Dec. 621; New York, etc. R. Co. v. N. Y. & N. H. R. Co., 52 Conn. 274; Hill

v. Nisbet, 100 Ind. 341; State v. Consolidation Coal Co., 46 Md. 11.

<sup>72</sup> Bell v. Pennsylvania, etc. R. Co. (Pa. 1887), 10 Atl. Rep. 741, 2 Ry. & Corp. L. J. 476.

<sup>73</sup> Carwater v. Merideth, 1 Wallace, 25; Lauman v. Lebanon, 30 Pa. St. 42, 72 Am. Dec. 685.

<sup>74</sup> McAuley v. Columbus, etc. Co., 83 Ill. 348.

<sup>75</sup> Gibbs v. Consolidated Gas Co., 130 U. S. 396.

<sup>76</sup> Tuttle v. Michigan, etc. Co., 35 Mich. 247; Mansfield, etc. Co. v. Brown, 36 Ohio St. 223; Ashley v. Ryan, 49 Ohio St. 504; Leavenworth, etc. Co. v. Chicago, etc. Co., C. C. U. S., 25 Fed. 219; Bradford v. Frankfort, etc. Co., 142 Ind. 383.

<sup>77</sup> New Orleans, etc. Co. v. Louisiana, etc. Co., 11 Fed. 277.

§ 1268. Authority conferred by charter or statute.—Authority to consolidate may be conferred in the original charters of the companies concerned; <sup>78</sup> or by the provisions of a general or special act of the legislature passed prior to consolidation, and after the organization of the original corporations.<sup>79</sup> But general statutes, authorizing the consolidation of corporations, are not retroactive, and do not apply to consolidation agreements made prior to their enactment.<sup>80</sup> Laws of that character are designed to apply to companies only which may effect a consolidation after their enactment.<sup>81</sup> Curative acts, validating defects in corporate organization, are generally upheld where the legislature could have given the corporation a valid organization in the first instance.<sup>82</sup> So, therefore, by the express sanction of the legislature, an unauthorized agreement to consolidate may be validated.<sup>83</sup> Furthermore, an invalid consolidation may be rendered valid by necessary implication from an act of legislature, recognizing the existence of the consolidated company.<sup>84</sup> Most of the statutes allowing consolidations, subject the new company to the general laws relating to corporations; and it acquires its new franchises subject to legislative alteration or repeal.<sup>85</sup> If the power to consolidate is granted to a corporation after its creation,<sup>86</sup> it is not, until accepted, a contract between the State and the corporation, and is subject to the reserved power of repeal or revocation adopted before such acceptance.<sup>87</sup> Subject to such reserved power, are exemptions, and other privileges and immunities enjoyed by the

<sup>78</sup> Nugent v. Supervisors, 19 Wall. 249; Sparrow v. Evansville, etc. R. Co., 7 Ind. 369.

<sup>79</sup> Bishop v. Brainerd, 28 Conn. 289; Black v. Delaware, etc. Co., 22 N. J. Eq. 130, 24 N. J. Eq. 455; Southall v. British, etc. Soc., L. R. 11 Eq. 65; Fisher v. Evansville, etc. R. Co., 7 Ind. 412.

<sup>80</sup> Hatcher v. Toledo, etc. R. Co. (1872), 62 Ill. 477, 480.

<sup>81</sup> Hatcher v. Toledo, etc. R. Co. (1872), 62 Ill. 480; Garrett v. Wiggins, 1 Scam. 335; Thompson v. Alexander, 11 Ill. 54; Marsh v. Chesnut, 14 Ill. 223.

<sup>82</sup> Syracuse City Bank v. Davis, 16 Barb. 188; Mitchell v. Deeds, 49 Ill. 416, 419. Cf. People v. Plank Road Co., 86 N. Y. 1.

<sup>83</sup> McAuley v. Columbus, etc. R. Co., 83 Ill. 348; Mead v. New York, etc. R. Co., 45 Conn. 199.

<sup>84</sup> Fisher v. Evansville, etc. R. Co., 7 Ind. 407; Mitchell v. Deeds, 49 Ill. 416, 95 Am. Dec. 621; Bishop v. Brainerd, 28 Conn. 289; Meade v. N. Y. etc. Co., 45 Conn. 199; McAuley v. Columbus, etc. R. Co., 83 Ill. 348.

<sup>85</sup> Railroad Co. v. Maine, 96 U. S. 499, affirming State v. Maine Cent. R. Co., 66 Me. 488; New Jersey v. Yard, 95 U. S. 104; Tomlinson v. Jessup, 15 Wall. 454.

<sup>86</sup> Pearsall v. Great Northern Ry. Co., 161 U. S. 646.

<sup>87</sup> Pearsall v. Great Northern Ry. Co., 161 U. S. 646.

consolidating corporations.<sup>88</sup> Where it has been reserved, the legislature may revoke the power to consolidate, conferred upon a railroad corporation, to the extent of prohibiting consolidation with parallel or competing lines.<sup>89</sup> And whether such power is reserved or not, the police power of the State is sufficient to authorize such revocation.<sup>90</sup> Some parts of an executed agreement in relation to consolidation, if legislative consent can be obtained, may be enforced even if assent be withheld.<sup>91</sup>

**§ 1269. Consent of shareholders to consolidate.**—The general rule is that the consent of every stockholder is necessary for consolidation, and those who dissent can not be compelled to assent.<sup>92</sup> For shareholders without their consent can not be forced

<sup>88</sup> *Atlantic & Gulf R. Co. v. Georgia*, 98 U. S. 359; *State v. Maine Central R. Co.*, 66 Me. 428; *Maine Central R. Co. v. Maine*, 96 U. S. 499; *Shields v. Ohio*, 95 U. S. 319.

<sup>89</sup> *Central R. etc. Co. v. Georgia*, 54 Ga. 401.

<sup>90</sup> *Cameron v. New York, etc. Co.*, 133 N. Y. 336.

<sup>91</sup> A consolidation of three railroad companies was proposed, the necessary funds to be raised by subscription of the stockholders of the several companies. It was doubtful whether one of the companies (the R. & A.) could obtain legislative consent to enter the combination, but it was arranged that the other two should combine at all events; and the subscribers were aware of this. The first call under the subscription stated that it was for the extension of one of the two roads whose consolidation was definitely arranged for, and for "other purposes." Afterwards the entire fund was paid in. A committee was appointed, after the first instalment was paid, to receive and disburse the fund. After this the consolidation agreement was filed. And it was decided that an advance by the committee to the R. & A. Company for the purpose of effecting the consolidation was authorized, though the legislature refused to

assent to its entering the combination. Defendants, a committee appointed to receive and disburse subscriptions for the purpose of effecting a consolidation of certain railroad companies, and extending the lines, may be required to account to the subscribers for the amount so received, and it is immaterial whether or not they were originally trustees or were legally appointed. *Gould v. Seney* (1889), 5 N. Y. Supp. 928, 7 Ry. & Corp. L. J. 143. But on appeal of this case it was held that the loan by the committee to the R. & A. Company, for the purpose of completing its line of railroad, to be repaid in case the agreement should not become operative as to that company, was a misappropriation of the fund, for which they became liable to account to the subscribers upon the legislature refusing to consent to the company entering the combination; but that the shareholders could not, at the time of compelling such accounting, insist that the committee should also account for bonds taken by them as collateral for the loan. *Gould v. Seney* (1889), 9 N. Y. Supp. 818, reversing 5 N. Y. Supp. 928.

<sup>92</sup> *Hamilton Co. v. Hobart*, 2 Gray, 543; *Gardner v. Hamilton Co.*, 33 N. Y. 421; *Mowrey v. Indianapolis, etc. R. Co.*, 4 Biss. 78;

into relations with new corporations.<sup>92</sup> Having embarked their money in one venture, they can not be compelled, against their will, to transfer it to a larger or wider venture; and accordingly, in the absence of a governing statute operative at the time of the subscription, a consolidation must, in order to be valid, be by the unanimous consent of the shareholders of both companies.<sup>94</sup> Those who, in such a matter as this, act without the acquiescence of all the stockholders, do so at their peril, and must take the consequences, if their act be undone at the instance of dissenting stockholders.<sup>95</sup> Thus where two companies amalgamated and the shareholders in each received shares in the amalgamated company, but by reason of the opposition of some of the shareholders the original companies remained in existence,—it was held that those who consented and received stock in the new company were still liable on the debts of the original companies.<sup>96</sup> Though shareholders can not be forced into a new corporation without their consent, statutes, in force at the time of their subscription, which authorize consolidation, are regarded as entering into and being a part of their subscription contracts.<sup>97</sup> And, under statutes of this character, purchasers of stock are presumed to have bought it in contemplation of a possible transfer of the property by a majority vote of the stockholders.<sup>98</sup> Without legislative reservation to that effect, amendments to charters or articles of association,

*Blatchford v. Ross*, 5 Abb. Pr. N. S. 441, 54 Barb. 42; Chapman v. Mad River, etc. R. Co., 6 Ohio St. 119; *In re Empire Assur. Co.*, L. R. 4 Eq. 341.

<sup>92</sup> *Blatchford v. Ross*, 54 Barb. 41; *Hartford, etc. Co. v. Crosswell*, 5 Hill, 383; *Frothingham v. Barney*, 6 Hun, 366.

<sup>94</sup> *Fisher v. Evansville, etc. R. Co.*, 7 Ind. 407; *Kean v. Johnson*, 9 N. J. Eq. 401; *Chapman v. Mad River, etc. R. Co.*, 6 Ohio St. 119; *Blatchford v. Ross*, 54 Barb. 45, 5 Abb. Pr. (N. S.) 434, 37 How. Pr. 100; *McVicker v. Ross*, 55 Barb. 247; *McCray v. Junction R. Co.*, 9 Ind. 358; *Illinois, etc. R. Co. v. Cook*, 29 Ill. 337; *Mowrey v. Indianapolis, etc. R. Co.*, 4 Biss. 78; *Nathan v. Thompkins*, 82 Ala. 438; *Indianapolis, etc. R. Co. v. Taylor*, 56 Tex. 96, 117; *Hamilton Mutual Ins. Co. v. Hobart*, 2 Gray,

543; *Clearwater v. Meredith*, 1 Wall (U. S.) 25, 39.

<sup>95</sup> *Mills v. Central R. Co.*, 41 N. J. Eq. 1, 13; *Canada Southern Ry. Co. v. Gebhard*, 109 U. S. 527; *Middletown v. Boston, etc. R. Co.*, 53 Conn. 351; *Gates v. Boston, etc. R. Co.*, 53 Conn. 333.

<sup>96</sup> *Ex parte Nash*, 26 L. T. N. S. 689.

<sup>97</sup> *Sparrow v. Evansville, etc. R. Co.*, 7 Ind. 366; *Bish v. Johnson*, 21 Ind. 269; *Bishop v. Brainerd*, 28 Conn. 289; *Nugent v. Supervisors*, 19 Wall. 241, 248. Cf. *Cork, etc. R. Co. v. Patterson*, 37 Eng. L. & Eq. 398; *Nixon v. Brownlow*, 3 Hurl. & N. 686; *Mansfield, etc. R. Co. v. Brown*, 26 Ohio St. 223.

<sup>98</sup> *Bates County v. Winters*, 112 U. S. 325; *Nugent v. Supervisors*, 19 Wall. 241; *Woodruff v. Erie Ry. Co.*, 93 N. Y. 609; *Troy, etc. R. Co. v. Boston, etc. R. Co.*, 86 N. Y. 107;

authorizing either consolidations or subdivisions, do not bind dissenting shareholders.<sup>99</sup> The court of highest authority has said, that in conferring the authority to consolidate, the legislature never intended to compel a dissenting stockholder to transfer his interest, because a majority of the stockholders consented to the consolidation; and that even if the legislature had manifested an obvious purpose to do so, the act would have been illegal, for it would have impaired the obligation of a contract.<sup>1</sup> A clause in the charter that the company, "in matters not expressed in the charter, shall have the rights and privileges granted to the most favored turnpike companies,"—will not be construed as conferring or implying power to compel a stockholder to consent that the corporation of which he is a member shall be united with another.<sup>2</sup>

*Consent a question of fact.*—To bind a shareholder in one company as a shareholder in another with which the first has been amalgamated, it must be shown as a question of fact that he agreed to become a member of that particular company.<sup>3</sup> A policy-holder can not be said to have novated with an insurance company, to which the company originally granting his policy has transferred its business, unless it can be proved that he intended to stand to the new company in the same position that he previously stood in, to

Abbott v. Johnstown, etc. R. Co., 80 N. Y. 27, 36 Am. Rep. 572; Middletown v. Boston, etc. R. Co., 53 Conn. 351; Gates v. Boston, etc. R. Co., 53 Conn. 333, where the requisite majority was three-fourths; Bish v. Johnston, 21 Ind. 299; Sparrow v. Evansville, etc. R. Co., 7 Ind. 369; Niantic Savings Bank v. Town of Douglas, 5 Bradw. 579; Simpson v. Denison, 10 Hare, 51, 56.

<sup>99</sup> Pearce v. Madison, etc. R. Co., 21 How. 441; Mowrey v. Cincinnati R. Co., 4 Biss. 83; Clearwater v. Meredith, 1 Wall. 25; Tuttle v. Michigan Air Line, 35 Mich. 247; New Jersey, etc. R. Co. v. Strait, 35 N. J. L. 322; Carlyle v. Terre Haute, etc. R. Co., 6 Ind. 316; McCrory v. Junction R. Co., 9 Ind. 358; Booé v. Junction R. Co., 10 Ind. 93; Shelbyville Turnp. Co. v. Barnes, 42 Ind. 498. See also Lau- man v. Lebanon Valley R. Co., 30 Pa. St. 42; Clinch v. Financial Co.,

L. R. 4 Ch. 117; Dougan's Case, L. R. 8 Ch. 540; Thomas v. Railroad Co., 101 U. S. 71; East Anglian R. Co. v. Eastern Counties R. Co., 11 C. B. 775; Eastern Counties R. Co. v. Hawkes, 5 H. L. Cas. 331; Abbott v. Johnstown, etc. R. Co., 80 N. Y. 27; McGregor v. Deal, etc. R. Co., 18 Ald. & El. (N. S.) 618, 22 L. J. Q. B. 69; Kean v. Johnson, 9 N. J. Eq. 401; Troy, etc. R. Co. v. Boston, etc. R. Co., 86 N. Y. 117; Middletown v. Boston, etc. R. Co., 53 Conn. 351.

<sup>1</sup> Clearwater v. Meredith, 1 Wall. 25, 39; Knoxville v. Knoxville, etc. R. Co., 22 Fed. Rep. 758. Cf. March v. Eastern R. Co., 43 N. H. 515, 40 N. H. 548, 77 Am. Dec. 732.

<sup>2</sup> Botts v. Simpsonville, etc. Turnpike Co. (Ky. 1889), 10 S. W. Rep. 134.

<sup>3</sup> *Ex parte Bagshaw*, L. R. 4 Eq. 341; *Challes' Case*, L. R. 6 Ch. 266; *Alabaster's Case*, L. R. 7 Eq. 273.

the old. The payment of premiums to the new company, and the fact that the name of the new company appears upon the headings of the receipts, are not of themselves sufficient evidence of such intention.<sup>4</sup> A banking company was empowered to act or unite with, buy up or absorb, any other company carrying on any business included among the objects of the company. The directors determined to amalgamate with a bank and to wind up voluntarily. The agreement was confirmed at a general meeting of the stockholders. The amalgamation took place and the bank afterward was wound up. A shareholder in the first company, who had not consented to the amalgamation, was placed upon the list of contributories on the ground that he was a shareholder in the amalgamated companies. But his name was ordered removed from the list on the ground, first, that the power given to the directors did not extend to the absorption of the company itself; that there was no amalgamation in the proper sense of that term; that the old company had been wound up; that the shareholder was not bound by the votes of the majority of shareholders, and therefore had done nothing to connect himself with the new company.<sup>5</sup>

**§ 1270. Payment for dissenting stock upon appraisement.**—Statutes exist in some of the State, providing for the appraisement and purchase of the shares of the dissenting minority; and where these statutes are in existence and operative at the date of the contract of subscription, that course is to be taken.<sup>6</sup> The New York "Business Corporation Law" of 1890 provides that if any stockholder, not voting in favor of such agreement to consolidate, shall at such meeting, or within twenty days thereafter, object to such consolidation and demand payment for his stock, such stockholder or such new corporation, if the consolidation takes effect at any time thereafter, may at any time within sixty days after such meeting, apply to the supreme court at any special term thereof held in the district in which any county is located in which such new corporation may have its place of business, upon at least eight days' notice to the new corporation,—for the appointment of three persons to appraise the value of such stock, and the court shall appoint three such appraisers, and designate the time and place of their first meeting, with such directions in regard to their

<sup>4</sup> Blundell's Case, 17 Sol. J. & Rep. 87. Laws 1883, p. 242, § 2; New York Laws 1884, ch. 237. So in England: 25 & 26 Vic. ch. 89. §§ 161, 175.

<sup>5</sup> Drew's Case, 16 L. T. N. S. 657.

<sup>6</sup> See N. J. Laws 1878, p. 58, § 2; N. J. Laws 1881, p. 221, § 8; N. J.

proceedings as shall be deemed proper, and also direct the manner in which payment for such stock shall be made to such stockholder. The court may fill any vacancy in the board of appraisers, occurring by refusal or neglect to serve or otherwise. The appraisers shall meet at the time and place designated, and they or any two of them, after being duly sworn honestly and faithfully to discharge their duties, shall estimate and certify the value of such stock at the time of such dissent, and deliver one copy to such new corporation, and another to such stockholder if demanded; the charges and expenses of the appraisers shall be paid by the new corporation. When the new corporation shall have paid the amount of such appraisal, as directed by the court, such stockholder shall cease to have any interest in such stock, and in the corporate property of such corporation, and such stock may be held or disposed of by such new corporation.<sup>7</sup> The legislature may, by the exercise of the right of eminent domain, grant authority to corporations having public duties to perform, to consolidate without consent of stockholders. As for example, when public necessity requires it, the legislature may grant authority to consolidate existing connected railroad routes, if they provide a just compensation for the shares of such stockholders as dissent.<sup>8</sup> Such statutes, however, are strictly construed, and accordingly it has been decided that authority to condemn for the purpose of consolidation, is no warrant for such proceedings against a shareholder dissenting from a lease.<sup>9</sup> And so the majority can not force a dissenting minority into such an arrangement, without first purchasing their shares at their market value, though no provision is made for compensation therefor.<sup>10</sup> The ground upon which the majority can force the minority to sell out, even for full value, has been somewhat criticised, though probably ineffectually.<sup>11</sup> It is, however, certainly not within the power of courts of law or equity, to decree that the stock of shareholders dissenting from a plan of consolidation, shall be condemned, appraised and sold, for the purpose of quieting factious opposition.<sup>12</sup> When a consolidation is effected wrongfully, and against the protest of a shareholder who has partially paid up his shares, the consolidated com-

<sup>7</sup> N. Y. Laws 1890, ch. 567, § 14.

<sup>10</sup> Lauman v. Lebanon Valley R.

<sup>8</sup> Black v. Delaware, etc. Co., 24

Co., 30 Pa. St. 42, 49.

N. J. Eq. 455.

<sup>11</sup> Mowry v. Indiana, etc. R. R.

<sup>9</sup> Mills v. Central R. Co., 41 N. Co., 4 Biss. 73, 17 Fed. Cas. 930.

J. Eq. 1.

<sup>12</sup> Mills v. Central R. Co., 41 N.

J. Eq. 1.

pany is liable to him for the value of them.<sup>13</sup> The interest of a dissenting stockholder is reckoned upon the proportionate share of his stock in the old company.<sup>14</sup> When an unauthorized consolidation is annulled, the shareholders of the consolidated corporation may recover the amounts paid in by them.<sup>15</sup>

**§ 1271. Remedies of dissenting stockholders.**—A dissenting stockholder may enjoin the majority from attempting to consolidate without his consent,<sup>16</sup> or, if the consolidation is so effected, he may recover in damages the value in money of his shares in the corporation.<sup>17</sup> A stockholder's suit to enforce a cause of action in favor of the corporation against directors, for alleged conspiracy to divert its assets to a new corporation, and pervert its business, will not be sustained where the new company did not compete with any business of the corporation, nor divert its business, but on the contrary it increased and became profitable after the purchase of the stock.<sup>18</sup> A pledgee of shares, though assigned in blank, is not a shareholder entitled to participate in proceedings for consolidation of companies, until after transfer of the shares upon the books.<sup>19</sup> Where the agreement, of stockholders for the consolidation of two corporations, was that one should take over all the property of the other, issue stock and bonds in payment therefor, issue and set aside one hundred thousand dollars of bonds of the one corporation to retire ninety-six thousand dollars in bonds of the other, the surplus to be divided among the stockholders of the two corporations;—this was held a valuable consideration incorporated in the resolution of the consolidated corpo-

<sup>13</sup> Taylor on Corporations, § 536; International, etc. R. Co. v. Bremond, 53 Tex. 96.

<sup>14</sup> Plaintiff and other creditors of an insolvent railroad company authorized their agents to purchase the road, and afterwards to transfer it to a new corporation, to complete the road, and operate it, for the purpose of securing their debts. Subsequently this corporation was consolidated with another, and plaintiff sued to recover the value of its interest in the property, as having been converted without its consent. It was decided that plaintiff was only entitled to recover its proportionate share of the stock of the corpora-

tion to which the road, with plaintiff's consent, was transferred after its purchase. Deposit Bank v. Barrett (Ky. 1890), 13 S. W. Rep. 337.

<sup>15</sup> *In re Bank of Hindustan*, L. R. 16 Eq. 417.

<sup>16</sup> Mowrey v. Indianapolis, etc., 4 Biss. 78, Fed. Cas. 9,891; Lau- man v. Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685.

<sup>17</sup> International, etc. R. Co. v. Bremond, 53 Tex. 96; Ervin v. Oregon, etc. Co., 27 Fed. 635.

<sup>18</sup> Rosenbaum v. Rice (1903), 83 N. Y. S. 494.

<sup>19</sup> Cleveland City Ry. v. First Nat. Bank (Ohio, 1903), 67 N. E. 1075.

ration according to agreement.<sup>20</sup> The majority may consolidate against the dissent of the minority of the stockholders of a corporation, if its charter, or the general law at the time of its creation, expressly empowered it to consolidate; and it so became part of the contract between the corporation and the stockholders.<sup>21</sup> Unless so authorized the majority can not consolidate against the dissent of the minority, nor can it derive authority from the legislature to so consolidate, to the impairment of the obligation of the contract between the dissenting shareholders and the corporation.<sup>22</sup> A dissenting stockholder can not be compelled to accept shares in the new corporation, in exchange for his shares in the old.<sup>23</sup> Conveyance of property of a component corporation, to the consolidated company, for appropriation to purposes different from those of the former company, may be enjoined by any one of its stockholders non-assenting, as an attempted usurpation of power in violation of the rights of such stockholders.<sup>24</sup>

*Rights of dissenting creditors.*—The creditors of a consolidating corporation are entitled to have its assets distributed as in case of simple dissolution.<sup>25</sup> If the consolidation is authorized by the legislature, the consent of the creditors is unnecessary.<sup>26</sup> They have their remedy either in equity, against the property of the several constituent corporations, for satisfaction of their claims,<sup>27</sup> or, at their option, against the property of the consolidated corporation.<sup>28</sup>

**§ 1272. Enjoining unauthorized consolidation.**—A dissenting stockholder, under any circumstances, is entitled to an injunction to restrain an *ultra vires* consolidation.<sup>29</sup> A consolidation of

<sup>20</sup> Read v. Citizens St. R. Co. (Tenn. 1903), 75 S. W. 1056.

<sup>21</sup> Sparrow v. Evansville, etc. R. Co., 7 Ind. 369; Bish v. Johnson, 21 Ind. 299; Sprague v. Illinois River R. Co., 19 Ill. 174.

<sup>22</sup> Clearwater v. Meredith, 1 Wall. (U. S.) 25; Lauman v. Lebanon R. Co., 30 Pa. St. 42, 72 Am. Dec. 685; State v. Bailey, 16 Ind. 46, 79 Am. Dec. 405; Kenosha, etc. Co. v. Marsh, 17 Wis. 13; Elyton Land v. Dowdell, 113 Ala. 177, 59 Am. St. Rep. 105.

<sup>23</sup> McVicker v. Ross, 55 Barb. (N. Y.) 247; Taylor v. Earle, 9 Hun (N. Y.), 1; Frothingham v. Barney, 6 Hun (N. Y.), 366; Lau-

man v. Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685.

<sup>24</sup> Rabe v. Dunlap (1893), 51 N. J. Eq. 40, 25 Atl. 959.

<sup>25</sup> Wabash, St. Louis, etc. Co. v. Ham, 114 U. S. 587.

<sup>26</sup> People v. Empire, etc. Ins. Co., 92 N. Y. 105; Houston, etc. Co. v. Shirley, 54 Tex. 125; Indianola R. Co. v. Fryer, 56 Tex. 609.

<sup>27</sup> Chicago, etc. R. Co. v. Mofitt, 75 Ill. 524; New Bedford R. Co. v. Old Colony R. Co., 120 Mass. 397.

<sup>28</sup> Chesapeake, etc. v. Virginia, 94 U. S. 718; Central R. & B. Co. v. Georgia, 92 U. S. 665.

<sup>29</sup> Charlton v. Newcastle, etc. R.

the corporate property, not expressly authorized by statute, is *ultra vires*, and may be set aside or enjoined at the instance of a single dissenting shareholder.<sup>30</sup> This is strictly true, at least until his interest is purchased or secured.<sup>31</sup> Of course, however, such dissenters may lose their right to object by acquiescence or laches.<sup>32</sup> A dissenting stockholder may maintain a suit to enjoin the illegal consolidation (of the corporation of which he is a member)—with another corporation, with the consent of the directors, and a majority of the stockholders acting in connection, but without notice to, and to the injury of, the minority thereof,—without averring that he has appealed to the governing body or the shareholders to prevent such illegal action, and has failed to obtain redress.<sup>33</sup> In such a suit, averments in the answers that the defendants had, after the resolutions to consolidate were adopted, determined to abandon, and had abandoned, the consolidation, can

Co., 5 Jur. (N. S.) 1096, 72 Week. Rep. 731; Nathan v. Thompkins, 82 Ala. 437. That he must first ask the directors to bring the action in the name of the corporation, see Mozley v. Alston, 1 Phil. Ch. 79; denied in Nathan v. Tompkins, 82 Ala. 437.

<sup>30</sup> Clearwater v. Meredith, 1 Wall. 40; Mowrey v. Indianapolis, etc. R. Co., 4 Biss. 78; Cass v. Manchester, etc. Co., 9 Fed. Rep. 640; Atlantic, etc. R. Co. Case, 3 Hughes, 320, 4 Hughes (N. S.), 151; Gardner v. Hamilton, etc. Ins. Co., 33 N. Y. 421; Blatchford v. Ross, 34 Barb. 42; Stevens v. Davison, 18 Gratt. 819, 98 Am. Dec. 692; South Georgia, etc. R. Co. v. Ayres, 56 Ga. 230; International, etc. R. Co. v. Bremond, 53 Tex. 96; Hamilton, etc. Ins. Co. v. Hobart, 2 Gray, 543; Boston, etc. R. Co. v. New England, etc. R. Co., 13 R. I. 260; Stevens v. Rutland, etc. R. Co., 29 Vt. 545; Terhune v. Midland R. Co., 38 N. J. Eq. 423; New Jersey Midland Ry. Co. v. Strait, 33 N. J. 325; Black v. Delaware, etc. Canal Co., 24 N. J. Eq. 455, reversing 22 N. J. Eq. 130; Zabriskie v. Hackensack, etc. R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617; Kean v. Johnson, 9 N. J. Eq. 401; Tippe-

canoe County v. Lafayette, etc. R. Co., 50 Ind. 85; Tuttle v. Michigan, etc. R. Co., 35 Mich. 247; Clinch v. Financial Corporation, L. R. 5 Eq. 401; *In re Empire Assurance Co.*, L. R. 4 Eq. 341; Winch v. Birkenhead, etc. Ry. Co., 5 De Gex & S. 562; McDonald v. Grand Canal Co., 3 Ir. Ch. N. S. 578; Bryson v. Warwick, etc. Co., 1 Smale & G. 447; Charlton v. Newcastle, etc. Ry. Co., 5 Jur. N. S. 1096; Dougan's Case, 28 L. T. N. S. 60. But see Lauman v. Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685; State v. Bailey, 16 Ind. 46, 79 Am. Dec. 405. Cf. Mills v. Central R. Co., 41 N. J. Eq. 1; Trask v. Peekskill, etc. Works, 6 Hun, 236.

<sup>31</sup> Lauman v. Lebanon, etc. R. Co., 30 Pa. St. 42; State v. Bailey, 16 Ind. 46; Mowrey v. Indianapolis R. Co., 4 Biss. 78; Nathan v. Tompkins, 82 Ala. 437, 19 Am. & Eng. Corp. Cas. 336.

<sup>32</sup> Deadrick v. Wilson, 8 Baxt. 108. Cf. International, etc. R. Co. v. Bremond, 53 Tex. 96, and Mowrey v. Indianapolis, etc. R. Co., 4 Biss. 78.

<sup>33</sup> Nathan v. Tompkins (1887), 82 Ala. 437.

not be considered on a motion to dissolve the injunction, as such an averment is affirmative matter, and not responsive to any allegation in the bill.<sup>34</sup> In a suit to enjoin the consolidation of two turnpike companies (under an act one provision of which was that, when the agreement between the two companies should be entered into and ratified by a majority of the stockholders of the two companies, the consolidated company should have all the powers previously enjoyed by both), the defendant's answer alleged that the consolidation was made as provided by statute, but failed to allege that this was done with the consent of plaintiffs,—thereby showing that the majority consented, and not the whole, and it was decided that the consolidation, not being authorized by the companies' charters, was void.<sup>35</sup> A bill to annul a consolidation made by several railroad corporations, and to have declared void, a mortgage, executed by the consolidated roads on the aggregate property—on the ground that one of the roads taken into the combination had no legal existence,—can not be maintained by the stockholders. Such proceedings should be instituted by the State, through its attorney general.<sup>36</sup>

**§ 1273. Whether consolidation works dissolution of the old company.**—Legislative consent to consolidation of existing corporations, has the effect of dissolving the former corporations,—and at the same instant of creating a new corporation, with property, liabilities and stockholders, derived from the old,—upon such terms and conditions as may be prescribed by the act of consolidation.<sup>37</sup> This is the converse of the proposition that a corporation may be dissolved by a surrender of its franchises, and an acceptance of them by the legislature.<sup>38</sup> So, generally, consolidation works a dissolution of the corporations previously existing, and at the same instant, the creation of a new corporation, with property liabilities and stockholders derived from those then passing out of existence.<sup>39</sup> Although the effect of consolidation gen-

<sup>34</sup> *Nathan v. Tompkins* (1887), 82 Ala. 437.

<sup>35</sup> *Botts v. Simpsonville, etc. Co.* (Ky. 1889), 10 S. W. Rep. 134; Ky. Act. Feb. 20, 1884.

<sup>36</sup> *Bell v. Pennsylvania, etc. R. Co.* (1887), 10 Atl. Rep. 741, not reported officially.

<sup>37</sup> *McMahan v. Morrison* (1861), 16 Ind. 172, 79 Am. Dec. 418.

<sup>38</sup> *McMahan v. Morrison* (1861),

16 Ind. 172, 79 Am. Dec. 418; *Lau-  
man v. Lebanon, etc. R. Co.*, 30 Pa.  
St. 42, 72 Am. Dec. 685.

<sup>39</sup> *Pullman Palace Car Co. v.  
Missouri Pacific Ry. Co.*, 115 U. S.  
187, 594; *Louisville, etc. R. Co. v.  
Palms*, 109 U. S. 244; *Railroad  
Co. v. Georgia*, 98 U. S. 359, 364;  
*Railroad Co. v. Maine*, 96 U. S.  
499, 508; *Shields v. Ohio*, 95 U. S.  
319, 320; *Philadelphia, etc. R. Co.*

erally is to dissolve the constituent companies, yet no such effect is produced as to the purchasing or absorbing company, where the consolidation takes place under the scheme of one company absorbing another by purchasing its stock and properties.<sup>40</sup> The

v. Maryland, 10 How. 376, 393; Ridgway Township v. Griswold, 1 McCrary, 151; Clearwater v. Meredith, 1 Wall. 25, 40, 42; Lightner v. Boston, etc. R. Co., 1 Low. 338; Indianola R. Co. v. Fryer, 56 Tex. 609, 616; Cheraw, etc. R. Co. v. Commissioners, 88 N. C. 519; Meyer v. Johnston, 53 Ala. 237, 64 Ala. 603; Miller v. Lancaster, 5 Cold. 514; Columbus, etc. R. Co. v. Powell, 40 Ind. 37; Indianapolis, etc. R. Co. v. Jones, 29 Ind. 465, 95 Am. Dec. 654; Eaton, etc. R. Co. v. Hunt, 20 Ind. 457; Mc-Mahan v. Morrison (1861), 16 Ind. 172; State v. Bailey, 16 Ind. 46, 79 Am. Dec. 405; Cooper v. Corbin, 105 Ill. 224; Racine, etc. R. Co. v. Farmers' Loan & Trust Co., 49 Ill. 331, 95 Am. Dec. 595.

<sup>40</sup> As in the case of Central R. Co. v. Georgia, 92 U. S. 665, where the court said: "We are not called upon to determine whether a consolidation, effected under a statute making no express grant of a new corporate existence, may not in some cases work a dissolution of existing corporations and at the same time the creation of a new company; for in the present case we think the act contemplated no such thing. It is true the act speaks of union and consolidation. It authorizes the two companies to unite and consolidate their stock and all their rights, privileges, immunities, property and franchises, but it prescribes the manner in which this may be done and its effect. It is to be done under the name and character of the Central company; that is, the union is to be under that charter, not under a new charter of a company bearing that name. The union is also to be in

such a manner that every holder of the shares of the capital stock of the Macon company shall be entitled to, and shall, on the surrender of their certificates, receive an equal number of shares of the capital stock as a shareholder in the Central company. But there is no provision for a surrender of the certificates of stock of the shareholders of the Central, and none for the issue of other certificates to them. Their rights, whatever they may be after the union, are evidenced by certificates of stock of the company chartered formerly. If that charter has gone out of existence, they are stockholders in no company. Again, the act declared that all contracts of either of the companies should be assumed by and be binding on the Central company, and all benefits and rights under the same, that is, under the contracts, should vest in that company, not in a new corporation then springing into life. Nowhere in the act is there an intimation of any legislative purpose that the Central Railroad Company should cease to exist. The Macon company was undoubtedly intended to go out of existence; for provision was made for the surrender of all the shares of its capital stock, and without stockholders it could not exist. The existence of such a provision in regard to one company and its absence in regard to the other is a strong argument in support of the conclusion that it was not intended the Central company should surrender its charter or dissolve, and still more, that company was authorized to increase its capital, plainly for the purpose

existence of one company is thus merged into that of the other, in which case the latter is not dissolved; <sup>41</sup> although the enabling act may refer to the merger as a "consolidation." <sup>42</sup> But consolidation does not necessarily work a dissolution of either company.<sup>43</sup> Dissolution of the old companies is not the necessary effect, in any case, unless the governing statute so states.<sup>44</sup> Even when so enacted, the consolidation does not work an entire dissolution of the constituent companies.<sup>45</sup> For, when for all other purposes the

of making room for the new shareholders entitled to come in by virtue of their ownership of shares of the dissolved company's stock. The language of this provision is significant. It is that upon the union and consolidation the capital stock of the Central company shall not exceed the amount of the authorized capital stock thereof and the present authorized capital of the Macon company added thereto. This refers plainly to the corporation which was contemplated should exist after the union and consolidation of the two companies. The act contemplated and authorized no such union and consolidation as should work a surrender of their charter by both of them and the creation of a new company. At most it intended a merger of the Macon company into the other, a mode of transfer of that company's franchise and property and a payment therefor with stock of the Central company. It is of no importance to the inquiry whether a new corporation was created by the union and consolidation, that the Central acquired under the act new and enlarged powers as well as new stockholders. It was authorized to own and operate a railroad over the route of the acquired road, and to operate it as its own. It was also authorized to increase its capital stock. But the gift of new powers to a corporation has never been thought to destroy its identity, much less to change it into a new being. Such

a gift is a grant of corporate existence. It assumes corporate life already existing. Nor is it a necessary inference from the provision of the act requiring the board of directors of each company to certify the union and consolidation to the governor of the state that the union was intended to be a surrender of the charter of both companies, and the acceptance of a new charter. There were sufficient reasons for that requirement without the large inference attempted to be drawn from it. They were that it might appear in the office of the secretary of state that the Macon company was no longer in existence and that the capital stock of the Central company had been increased."

<sup>41</sup> Philadelphia, etc. R. Co. v. Maryland, 10 How. 376; Central R. & B. Co. v. Georgia, 92 U. S. 665; Atlantic & Gulf R. Co. v. Georgia, 98 U. S. 359; Philadelphia, etc. Co. v. Maryland, 10 How. (U. S.) 376; Chicago, etc. Co. v. Ashling, 160 Ill. 373; Bishop v. Brainerd, 28 Conn. 289; Berry v. Kan. City, etc. Co., 52 Kan. 759 & 774, 39 Am. St. Rep. 371, 381.

<sup>42</sup> Central R. Co. v. Georgia, 92 U. S. 665.

<sup>43</sup> Railroad Co. v. Georgia, 98 U. S. 359, 362; Lightner v. Boston, etc. R. R. Co., 1 Low. 338, 340.

<sup>44</sup> Edison Electric Light Co. v. New Haven Electric Co., 35 Fed. Rep. 233.

<sup>45</sup> McMahan v. Morrison, 16 Ind. 172; Fee v. New Orleans Gaslight Co., 35 La. Ann. 413; State v.

original corporations have been dissolved by a consolidation, there remains a qualified existence for the purpose of winding up its affairs;<sup>46</sup> and as we have seen, stockholders (in the old who do not enter the new) are entitled to withdraw their shares of the capital stock, and may enjoin till they are secured to them.<sup>47</sup> It may be that the consolidation of two corporations, or amalgamation, as it is called in England, if full and complete, may work a dissolution of them both, and its effect may be the creation of a new corporation. Whether such be the effect or not, must depend upon the statute under which the consolidation takes place, and upon the intention therein manifested. If, in the statute, there be no words of grant of corporate powers, it is difficult to see how a new corporation is created. If created it must be by implication; and it is an unbending rule that a grant of corporate existence is never implied. In the construction of a statute, every presumption is against it.<sup>48</sup> A new corporation is not necessarily created by consolidation. One corporation with all its franchises, property and rights, may be merged with those of another corporation, and continued as the latter. "When the rights, franchises, and effects of two or more corporations, by legal authority and agreement of the parties, are combined and united into one whole, and committed to a single corporation, the stockholders of which are composed of those (so far as they choose to become such), of the companies thus agreeing, this is in law, and according to common understanding, a consolidation of such companies;—whether such single corporation, called the consolidated company, be a new one, then created, or one of the original companies, continuing in existence with only larger rights, capacities and property."<sup>49</sup>

*Mere attempt to consolidate does not work dissolution.*—An ineffectual, or unauthorized, attempt of corporations to consolidate, is void. The corporations acquire neither *de facto* nor *de jure*

Sherman, 22 Ohio St. 411; Hamilton Ins. Co. v. Hobart, 2 Gray, 543; Commonwealth v. Atlantic, etc. R. Co., 54 Pa. St. 9; Ridgway Township v. Griswold, 1 McCr. 152, 153, *per* Dillon, J.; Tomlinson v. Branch, 15 Wall. 460; Clearwater v. Meredith, 1 Wall. 25.

<sup>46</sup>Edison Electric Light Co. v. New Haven Electric Light Co., 35 Fed. Rep. 233.

<sup>47</sup> State v. Bailey (1861), 16 Ind.

46, 79 Am. Dec. 405; Lauman v. Lebanon, etc. R. Co., 30 Pa. St. 42, 72 Am. Dec. 685; McCray v. Junction R. Co., 9 Ind. 358.

<sup>48</sup>Central R. etc. Co. v. Georgia, 92 U. S. 665, 670. Acc. Wabash, etc. Ry. Co. v. Ham, 114 U. S. 587, 595; Railroad Co. v. Georgia, 98 U. S. 359.

<sup>49</sup>Meyer v. Johnston, 64 Ala. 603.

existence, as a consolidated corporation, and can acquire no right as such, nor does the attempt work a dissolution.<sup>50</sup>

**§ 1274. Pending suits how affected.**—It has been said that a pending suit may proceed to judgment against the old corporation, just as a suit against a *feme sole* may proceed to judgment against her after marriage.<sup>51</sup> For the legislature has no power to authorize it, nor can the corporation act under legislative sanction, so as to defeat or prejudice the rights of plaintiffs in pending suits against it. As to such actions, the corporation exists for the purpose of judgment; for as to them it has not lost its individuality or identity. For no act of a defendant can defeat the right of a plaintiff.<sup>52</sup> Actions pending against the old company, therefore, do not abate.<sup>53</sup> Even in case of a dissolution of its corporate existence, the existence of the defendant company continues for the purpose of the suit.<sup>54</sup> For consolidation does not extinguish the liability of old companies, upon suits which were commenced prior to their amalgamation,<sup>55</sup> even though the consolidation may be accompanied by a change of name of the company engaged in the litigation.<sup>56</sup> It is not necessary that the plaintiff should take any notice thereof. He is entitled to judgment against the corporation by its former name.<sup>57</sup>

**§ 1275. Consolidation of parallel or competing railroads, prohibited. Connecting or intersecting lines.**—In New York it is expressly enacted, that no companies or corporations of that State, whose railroads run on parallel or competing lines, shall be authorized by the act to merge or consolidate.<sup>58</sup> Prohibitions

<sup>50</sup> *Peninsular Ry. v. Thorp*, 28 Mich. 506; *Greenville, etc. Co. v. Planters'*, etc. Co., 70 Miss. 669, 35 Am. St. Rep. 681; *State v. Crawfordsville, etc. Co.*, 102 Ind. 600.

<sup>51</sup> *Shackelford v. Mississippi*, etc. R. Co., 52 Miss. 150; *Roosevelt v. Dale*, 2 Cow. 581.

<sup>52</sup> *Shackelford v. Mississippi*, etc. R. Co., 52 Miss. 159.

<sup>53</sup> *Baltimore, etc. R. Co. v. Muselman*, 2 Grant Cas. 348; *Hanna v. Cincinnati, etc. R. Co.*, 20 Ind. 30; *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 389, 394; *Shackelford v. Mississippi Central R. Co.*, 52 Miss. 159; *East Tennessee, etc. R. Co. v. Evans*, 6 Heisk.

607. Cf. *Prouty v. Lake Shore, etc. Ry. Co.*, 52 N. Y. 363.

<sup>54</sup> *East Tennessee, etc. R. Co. v. Evans*, 6 Heisk. 607; *Shackelford v. Mississippi Central R. Co.*, 52 Miss. 159; *Baltimore, etc. R. Co. v. Musselman*, 2 Grant Cas. (Pa.) 348; *Bruffet v. Great Western R. Co.*, 25 Ill. 353, 357.

<sup>55</sup> *Baltimore, etc. R. Co. v. Muselman*, 2 Grant, 348; *Prouty v. Lake Shore, etc. R. Co.*, 52 N. Y. 363; *Shackelford v. Mississippi, etc. R. Co.*, 52 Miss. 159.

<sup>56</sup> *East Tennessee, etc. R. Co. v. Evans*, 6 Heisk. 607.

<sup>57</sup> *Shackelford v. Mississippi, etc. R. Co.*, 52 Miss. 159.

<sup>58</sup> *Vide supra*, § 946, "TRUSTS,"

against "consolidation" are used in the broadest sense, as an absolute inhibition of any joining or uniting of stock, property, franchises, or earnings, in whole or in part, by companies owning parallel or competing lines.<sup>59</sup> But it has been held in New York that a lease of a parallel and competing line for four hundred and seventy-five years, was not tantamount to a consolidation within this prohibition.<sup>60</sup> In statutes providing for the consolidation of railways which are "constructed so as to permit the passage of burden or passenger cars, over any two or more such roads continuously without break of gauge or interruption," the word "continuously" is construed to be restrictive, and exclusive of parallel or competing lines.<sup>61</sup> So, the fact that a railroad company, empowered by its charter "to join stock or consolidate with any other railway company running in the same direction," is forbidden to "rent, sell, lease, or consolidate with any parallel or competing railroad," does not impliedly authorize it to sell its road and franchises to a company whose road, though not a parallel or competing line, does not run in the same general direction. A railroad company authorized to purchase, sell, lease, join stocks, unite or consolidate with any connecting railroad company has no power to purchase a road which does not connect with that which the company is authorized to construct, though it may have built or purchased a line connecting therewith. A railroad, by its relations to other roads, may be a competing line with a road with which it is not parallel, and does not connect, within the meaning of an act forbidding it to consolidate with a competing road.<sup>62</sup> With respect to *connecting or*

and *vide* 45 L. R. A. 271; N. Y. Laws of 1869, ch. 917, § 9.

<sup>59</sup> State v. Atchison, etc. R. Co. (1888), 24 Neb. 143, 4 Ry. & Corp. L. J. 86, 91, construing Neb. Const. art. xi, § 3. In the foregoing case the prohibition was held to extend to leases of parallel or competing lines. *Acc.* State v. Vanderbilt, 37 Ohio St. 590.

<sup>60</sup> Gere v. New York, etc. R. Co. (1885), 19 Abb. N. C. 202.

<sup>61</sup> State v. Atchison, etc. R. Co. (1888), 24 Neb. 143, 4 Ry. & Corp. L. J. 86, 89, citing State v. Vanderbilt, 37 Ohio St. 590, construing a similar statute in Ohio, where it was held that two roads run-

ning parallel and near each other for sixty miles, had no authority to consolidate.

<sup>62</sup> East Line, etc. R. Co. v. State (1889), 75 Tex. 434, 7 Ry. & Corp. L. J. 308. In that case it was further decided that under Const. Tex., art. 10, sec. 8, providing that no railroad company in existence at its adoption, "shall have the benefit of any future legislation, except on condition of complete acceptance of all the provisions of this constitution," an admission by a company in pleading, that it is subject to the general laws and constitution now in force, is an admission of the acceptance of the

*intersecting railways*, however, so located as not to be natural competitors for the business of the same district of country, there is generally no principle of public policy rendering their consolidation invalid.<sup>63</sup>

**§ 1277. Consolidation of interstate corporations.**—Any such thing as a single corporation, created concurrently by the legislation of two or more States, is impossible.<sup>64</sup> And where two States benefit of subsequent legislation, such as subjects it to the provisions (art. 10, § 6) forbidding a sale to a railroad company organized in another state. As Rev. Stat. Tex., art. 2805, makes it the duty of the attorney-general, unless otherwise expressly directed by law, to seek the forfeiture of the charter of a corporation which has, by any act or omission, mis-user or non-user, forfeited the same, the right of the state to demand a forfeiture of the charter of a railroad company which has sold its road and franchise to a foreign company in violation of the constitution, failed to keep up its organization, and allowed its road to become unsafe, is not waived by the provisions of Sayles' Civil Stat. Tex., art. 4247a, § 2, which provides for *quo warranto* against a corporation carrying on business in violation of Const. Tex., art. 10, §§ 5, 6 (forbidding sale to or consolidation with a competing or foreign company), to enforce the penalties therefor, and an injunction against future violation, and appointment of a receiver.

<sup>63</sup> Woodruff v. Erie, etc. Ry. Co., 93 N. Y. 615; State v. Vanderbilt, 37 Ohio St. 590; State v. Atchison, etc. R. Co. (1888), 24 Neb. 143, 4 Ry. & Corp. L. J. 86; Hill v. Nisbet, 100 Ind. 341.

<sup>64</sup> Allegheny Co. v. Cleveland, etc. R. Co. (1865), 51 Pa. St. 228, following Ohio, etc. R. Co. v. Wheeler, 1 Black, 286; Newport, etc. Co. v. Woolley (1880), 78 Ky. 523, where the court very vigorously states the rule: "In the case

before us it appears that the states of Kentucky and Ohio each created a corporation which was given the same name. The object of each was to construct a bridge across the Ohio river, between Newport and Cincinnati. The powers conferred by each state upon its creation are complete; so full, that if either state had not given its corporation any powers, the other would still remain invested with full power to construct the bridge to the extent of the territorial jurisdiction of the state which gave it life, but no farther. . . . The appellant claims that it is one entity by two laws emanating from different sovereignties with no joint governmental powers over such a subject. This seems to be an absurdity, because the law-making power of neither state can bind the other. Kentucky or Ohio has plenary power to create a corporation, but neither can create a part of the elements of a corporation, and rely upon the other to complete it, and by this unauthorized marriage of distinct legislative powers, produce a being which has not received full life from either. Each legislative power must complete the corporation, or it can never be one, because the completing act of one state is not binding upon the state which began, but failed or refused to complete and give legal existence to a corporation. Otherwise persons who should receive from a state only part of the powers, but were denied the rest which were necessary to create a

have each created a corporation with the same name, for the same purposes, and composed of the same natural persons, it must, nevertheless, be considered as a distinct corporation in each.<sup>65</sup> "The legislature of Illinois and of Missouri can not act jointly, nor can any legislation of the last-named State have the least effect in creating a corporation in this State, (Illinois.) Hence, the corporate existence of the appellants, considered as a corporation of this State, must spring from the legislation of this State, which, by its own vigor, performs the act. The States of Illinois and Missouri have no power to unite in passing any legislative act. It is impossible, in the very nature of their organizations, that they can do so. They can not so fuse themselves into a single sovereignty, and, as such, create a body politic which shall be a corporation of the two States, without being a corporation of each State, or of either State. . . . The only possible *status* of a company acting under charters from two States, is, that it is an association incorporated in and by each of the States, and when acting as a corporation in either of the States, it acts under the authority of the charter of the State in which it is then acting, and that only,—the legislation of the other State having no operation beyond its territorial limits."<sup>66</sup> "It is impossible," said the Michigan court, "to conceive of one joint act, performed simultaneously by two sovereign States, which shall bring a single corporation into being, except it be by compact or treaty. There may be separate consent given for the

corporation, could apply to a foreign state for supplementary legislation, which would authorize the building of railroads and bridges upon one soil, and give to its laws an extra-territorial force—a doctrine that has always been successfully denied among these states, which hold the relation to each other of foreign states in close friendship. The creative power of two states can neither be added to nor subtracted from by another, so as to strengthen or weaken the power of the former in its own territory, and the proposition that two states can jointly create, by partial legislation in each, a corporation which has a complete legal

existence in either, must fall to the ground.

<sup>65</sup> Racine, etc. R. Co. v. Farmers' Loan, etc. Co., 49 Ill. 331, 348, 95 Am. Dec. 595; Quincy, etc. Co. v. County of Adams, 88 Ill. 615; Burger v. Grand Rapids, etc. R. Co., 22 Fed. Rep. 561; Colglazier v. Louisville, etc. Ry. Co., 22 Fed. Rep. 568.

<sup>66</sup> Quincy R., etc. Co. v. Adams County, 88 Ill. 615. Also see Ohio & Mississippi R. Co. v. Wheeler, 1 Black (U. S.), 286; Clark v. Barnard, 108 U. S. 436; Nashua, etc. Corp. v. Boston, etc. Corp., 136 U. S. 356; Mobile & Ohio R. Co. v. Barnhill, 91 Tenn. 395, 30 Am. St. Rep. 889.

consolidation of corporations separately created; but when the two unite, they severally bring to the new entity the powers and privileges already possessed, and the consolidated company simply exercises in each jurisdiction the powers the corporation there chartered has possessed, and succeeds there, to its privileges. . . . It may well happen, as indeed it often has happened, that the consolidated company will be a corporation possessing in one State very different rights, powers, privileges and immunities to those possessed in another, and subject to very different liabilities. . . . And, after the consolidation, each State legislates in respect to the road within its own limits, and which was constructed under its grant of corporate power, the same as it did before. . . . And it can not follow the new organization, with its legislation, into another State. . . . When, therefore, two corporations, created in different States, consolidate, though for most purposes they are not thereafter to be separately regarded, yet, in each State, the consolidated company is deemed to stand in the place of the corporation to which it there succeeded, and of its members, and consequently to be a citizen of that State for many purposes, while in the other State it would stand in the place of the other corporation, in respect to citizenship there."<sup>67</sup> It has been decided, however, with perhaps only a verbal distinction, that a corporation may have a two-fold organization, and be, so far as its relation to one State is concerned, both foreign and domestic. It may have a corporate entity in each State, being in its general character of a bi-fold organization.<sup>68</sup> Yet it has no legal existence in either State, except by the laws thereof. And neither State can confer upon it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of, and represent, under the corporate name, the same natural persons. But the legal entity or person, which exists by force of law, can have no existence beyond the

<sup>67</sup> Per Chief Justice Cooley in *Chicago & N. W. Ry. Co. v. Auditor General*, 53 Mich. 79.

<sup>68</sup> *McGregor v. Erie Ry. Co.*, 35 N. J. 118; *Bishop v. Brainerd*, 28 Conn. 289; *Ohio, etc. R. Co. v. Wheeler*, 1 Black, 286, limited by *Railroad Co. v. Harris*, 12 Wall. 65; *Copeland v. Memphis, etc. R. Co.*, 3 Woods, 651, 658; *Blackburn v. Selma, etc. R. Co.*, 2 Phil. 525;

*Allegheny Co. v. Cleveland, etc. R. Co.*, 51 Pa. St. 228; *Newport, etc. Co. v. Woolley*, 78 Ky. 523; *Burger v. Grand Rapids, etc. R. Co.*, 22 Fed. Rep. 561; *Colglazier v. Louisville, etc. R. Co.*, 22 Fed. Rep. 568; *State v. Northern Central Ry. Co.*, 18 Md. 193; *Sprague v. Hartford, etc. R. Co.*, 5 R. I. 233; *State v. Metz*, 32 N. J. 199; *Bridge Co. v. Mayer*, 31 Ohio, 317.

limits of the State or sovereignty which brings it into life, or endows it with its facilities and powers.<sup>69</sup> But there seems to be no reason why several States can not, by competent legislation, unite in combining several pre-existing corporations into a single one,<sup>70</sup> nor why one State may not make a corporation of another State, as there organized and conducted, a corporation of its own, *quoad hoc*, any property within its territorial jurisdiction.<sup>71</sup> On the same principle, and to the same effect, as in the case of the creation of companies by the concurrent legislation of several States, consolidations take place between corporations created by adjoining States, for the operation of railway, telegraph and other continuous or connecting lines of work.<sup>72</sup> As consolidations sometimes take the form of an absorption of one company by another, the former company purchasing from the shareholders of the latter their shares and issuing its own shares in payment,<sup>73</sup>—the legislature may authorize a domestic corporation thus to surrender its existence to a foreign one.<sup>74</sup> But a domestic company can not sell out to a foreign one, and take the latter's stock in place of its own, without legislative authorization.<sup>75</sup>

**§ 1878. Status of interstate consolidated corporations.**—In general, it may be said that a company created by the consolidation of foreign corporations, remains a domestic corporation of each of the concurring States, the peculiar legislation of neither State becoming operative within the limits of the other. Its property within the particular State, is subject to taxation, or vested

<sup>69</sup> Ohio, etc. R. Co. v. Wheeler, 1 Black, 286, *per* Taney, C. J.

<sup>70</sup> Railroad Co. v. Harris, 12 Wall. 65, citing Wilmer v. Atlanta, etc. R. Co., 2 Woods, 409; Easton v. Delaware, etc. Co., 32 N. J. L. 199; Taney, C. J., in Philadelphia, etc. R. Co. v. Maryland, 10 How. 376.

<sup>71</sup> Railroad Co. v. Harris, 12 Wall. 65, where the court continued: "That this may be done was distinctly held in Ohio, etc. R. Co. v. Wheeler, 1 Black, 286, . . . So far as there is anything in the language of the court in Ohio, etc. R. Co. v. Wheeler, in conflict with what has been here said, it is intended to be restrained and qualified by this opin-

ion." Mitchell v. Bunch, 2 Paige Ch. 606; Wilmer v. Atlanta, etc. R. Co., 2 Woods, 409; Ramsey v. Bradford, 2 Dese. 587; Coggar v. Howard, 1 Barb. Ch. 368; Dennis-town v. New York, etc. R. Co., 1 Hill, 62.

<sup>72</sup> Farnham v. Blackstone Canal Co., 1 Sumner, 46; Racine, etc. R. Co. v. Farmers', etc. Co., 49 Ill. 331, but each case allowed that there were separate legal entities in each state.

<sup>73</sup> Lauman v. Lebanon Val. R. Co., 30 Pa. St. 46.

<sup>74</sup> Racine, etc. R. Co. v. Farmers', etc. Co., 49 Ill. 331.

<sup>75</sup> Black v. Delaware, etc. R. Co., 24 N. J. Eq. 456; Taylor v. Earle, 8 Hun, 1.

with immunity from it, according to its laws, or to the provisions of the original charter of the constituent company, these privileges not being destroyed by the consolidation, unless otherwise provided by the constitution or by the statute.<sup>76</sup> For, although the consolidation of corporations organized and existing under the laws of the same State, creates an entirely new and distinct corporation, this is not the result where the corporations owe their existence to different sovereignties. Although in fact they may be so united as to have a physical connection and be practically one body, yet they remain "separate corporations in each State," the only effect of the consolidation being the creation of a community of interest. Their powers, rights and duties remain distinct as before. There is a union of interest and property, but no merger of personal or legal identity.<sup>77</sup> When, however, consolidation is effected by permission of laws of the several States, the united corporations are practically placed under the same management and control; and contracts, made by the controlling power, which assume a unity of action, are held to be made by each of the corporations.<sup>78</sup> When two or more corporations are consolidated under the laws of different States, they each become domesticated in each State, and neither is subject to attachment as a foreign corporation.<sup>79</sup> A company is none the less a domestic corporation by reason of having been created by the consolidation of domestic and foreign corporations.<sup>80</sup> Illustration is where an Arkansas

<sup>76</sup> *Vide* 15 L. R. A. 882, STATUS OF INTERSTATE CORPORATIONS; *Vide infra*, CITIZENSHIP OF CORPORATIONS, § 1341. Ohio, etc. R. Co. v. Weber, 96 Ill. 443; Bridge Co. v. Adams Co., 88 Ill. 615; *In re St. Paul*, etc. R. Co., 36 Minn. 85; Clark v. Barnard, 108 U. S. 436; Railroad Co. v. Vance, 96 U. S. 436; Memphis, etc. R. Co. v. Alabama, 107 U. S. 581; Colorado Const., art. xv, § 14.

<sup>77</sup> Muller v. Dows, 94 U. S. 444; Farnum v. Blackstone Canal Co., 1 Sum. 47; Racine, etc. R. v. Farmers', etc. Co., 49 Ill. 331; Bissell v. Michigan, etc. R. Co., 22 N. Y. 258; Graham v. Boston, etc. R. Co., 118 U. S. 161, 14 Fed. Rep. 753; Stone v. Farmers' Loan & Trust Co., 116 U. S. 307; Stone v. Illinois Central R. Co., 116 U. S.

347; Eaton, etc. R. Co. v. Hunt, 20 Ind. 457; Chicago, etc. R. Co. v. Moffitt, 75 Ill. 524.

<sup>78</sup> Bissell v. Michigan, etc. R. Co., 22 N. Y. 526; Racine, etc. R. Co. v. Farmers', etc. Co., 49 Ill. 331; Racine, etc. R. Co. v. Farmers' Loan, etc. Co., 49 Ill. 331, 95 Am. Dec. 595; Graham v. Boston, etc. R. Co., 118 U. S. 161.

<sup>79</sup> Sprague v. Hartford, etc. R. Co., 5 R. I. 233; Phillipsburg Bank v. Lackawanna R. Co., 27 N. J. L. 206; State v. Delaware, etc. R. Co., 30 N. J. 473.

<sup>80</sup> Muller v. Dows, 94 U. S. 444; Peck v. Chicago, etc. R. Co., 94 U. S. 164; Matter of Sage, 70 N. Y. 220; Sprague v. Hartford, etc. R. Co., 5 R. I. 233; McElrath v. Pittsburgh, etc. R. Co., 61 N. Y. 353; Quincy R., etc. Co. v. Adams

corporation, owning a line of railroad in Arkansas, consolidated with a Missouri corporation, owning a line of railroad in Missouri; and by consolidation, the consolidated company became the owner of the road in both States, but in Arkansas, it is to be regarded as an Arkansas corporation, and in Missouri, as a Missouri corporation.<sup>81</sup> A railroad corporation, however, which, though made up by consolidation of distinct corporations chartered by the legislatures of different States, has a capital stock which is a unit, and only one set of shareholders who have an interest, by virtue of their ownership of shares of the stock, in all of its property everywhere, has a domicile in each State, and the corporation or shareholders can, in the absence of any statutory provision to the contrary, hold meetings and transact business in any one State, so as to bind the corporation as to its property everywhere.<sup>82</sup>

**§ 1279. Powers and duties of interstate companies. Insolvency. Liens. Receivers.**—Where two companies are consolidated under the laws of different States, the new company stands in the same relation to each State, as the original company in that State.<sup>83</sup> For a consolidated company succeeds to the powers possessed by both of the preceding companies.<sup>84</sup> But it succeeds to the peculiar powers or priviléges possessed by either, only within the State of its creation.<sup>85</sup> And none of the States can impair the rights vested in the companies composing the consolidated corporation. Accordingly, no one of the States can impose a tax on the whole property of the consolidated company, when one of them was originally exempt from taxation, unless the removal of the exemption was a condition of allowing the

County, 88 Ill. 615; Nashua, etc. Corp. v. Boston, etc. Corp., 136 U. S. 356.

<sup>81</sup> Central Trust Co. v. St. Louis, A. & T. Ry. Co. (1890), 41 Fed. Rep. 551, 7 Ry. & Corp. L. J. 456, where the court said: "The amended and supplemental bill filed in this district alleges the defendant is a corporation created by and existing under the laws of the state of Arkansas . . . and a resident and citizen of said state of Arkansas. This is a correct statement of the legal status of the defendant in this state. The consolidated company

owns the road in both states; but in Arkansas it is an Arkansas corporation and in Missouri it is a Missouri corporation. Acts Ark. 1889, p. 43; Railway Co. v. Whittton's Adm'r, 13 Wall. 270; Muller v. Dows, 94 U. S. 444."

<sup>82</sup> Graham v. Boston, etc. R. Co. (1885), 118 U. S. 161; Bridge Co. v. Mayer, 31 Ohio St. 317.

<sup>83</sup> Delaware Railroad Tax Cases, 18 Wall. 206.

<sup>84</sup> Meade v. New York, etc. Co., 45 Conn. 199, 221.

<sup>85</sup> Delaware Railroad Tax Cases, 18 Wall. 206; Pittsburg, etc. R. Co. v. Reich, 101 Ill. 157, 174.

consolidation.<sup>86</sup> But a consolidated company may, under domestic legislation, avail itself of the permissive legislation of a concurring State.<sup>87</sup> Each constituent part, of a consolidated railway company, remains subject to statutes regulating charges for transportation.<sup>88</sup> And each of the original companies continues subject to the insolvency laws of the State of its creation.<sup>89</sup> Specific liens follow the property into the hands of the new corporation, but are, it seems, enforceable only in the forum of the *situs* of the property.<sup>90</sup> Each respective component part of the consolidated company is subject also to the jurisdiction of the courts of its State, with respect to the appointment of receivers.<sup>91</sup> When, however, the two corporations have the same name, the same stockholders, a unity of stock and of interest,—an action against one of them will bring all the parties, necessary for the complete settlement of a controversy, before the court, and its decrees will be binding upon them.<sup>92</sup> But a State is not to be deprived of its jurisdiction over a corporation created by it, in actions brought by its citizens against it under its new name, by a removal of the cause to a federal court, upon the motion of one of the other consolidating companies created by another State.<sup>93</sup>

*Liability for injuries by accident due to negligence.*—Where consolidated interstate railroads contracted to carry a passenger over the consolidated road, incorporated in two or more States, and the passenger was injured by accident in transit, due to negligence, they were held liable in damages, and not allowed to plead *ultra vires* in defense thereto.<sup>94</sup>

§ 1280. *Proof of consolidation.*—A defendant corporation can not be held liable for the debts and liabilities of another corporation, without a consolidation that has been authorized, and has actually taken place. The existence of a statute authorizing

<sup>86</sup> Chesapeake, etc. R. Co. v. Virginia, 94 U. S. 718; Philadelphia, etc. R. Co. v. Maryland, 10 How. 376; Branch v. Charleston, 92 U. S. 677; Delaware R. Co. v. Cox, 18 Wall. 206; State v. Commissioner of Railroad Taxation, 37 N. J. 243; Wood's Ry. Law, 1685.

<sup>87</sup> Att'y-Gen. v. Boston, etc. R. Co., 109 Mass. 39.

<sup>88</sup> Stone v. Farmers' Loan & Trust Co., 116 U. S. 307.

<sup>89</sup> Platt v. New York, etc. R. Co., 26 Conn. 544, 571.

<sup>90</sup> Eaton, etc. R. Co. v. Hunt, 20 Ind. 457, 464.

<sup>91</sup> *In re United States Rolling Stock Co.*, 55 How. Pr. 286; Taylor v. Atlantic, etc. R. Co., 55 How. Pr. 275; Ellis v. Boston, etc. R. Co., 107 Mass. 1; Richardson v. Vermont, etc. R. Co., 44 Vt. 613.

<sup>92</sup> Paine v. Lake Erie, etc. R. Co., 31 Ind. 347.

<sup>93</sup> Chicago, etc. R. Co. v. Lake Shore, etc. Ry. Co., 5 Fed. Rep. 19.

<sup>94</sup> Bissell v. Michigan, etc. R. R. Co. (1893), 22 N. Y. 258.

it, does not, of course, prove the fact, since action under the statute is necessary, and whether this has taken place, can not be judicially known by the courts.<sup>95</sup> The plaintiff must, therefore, make proof of the fact of consolidation, unless it is admitted; and it has been held that it may be admitted by the appearance of the consolidated company as a defendant to an action brought against the old company.<sup>96</sup> Solemn admissions made by one of the constituent companies in a judicial proceeding, may be evidence against the consolidated company.<sup>97</sup> In making proof of consolidation, it has been held that a plaintiff is aided by the rule of estoppel, which operates against corporations in other cases, prohibiting them from denying their corporate existence.<sup>98</sup> The statutes generally provide that copies of the articles of consolidation, filed with the Secretary of State, shall be proof of the fact in all courts; and this, it is supposed, would be the rule without an express statute.<sup>99</sup> In pleading consolidation, it is sufficient to state that the constituent companies, naming them, were authorized by law to consolidate, and that, having done so, they have become one corporation under a certain name.<sup>1</sup> For, in averring the fact of consolidation, the steps which have led up to it, need not be stated.<sup>2</sup> A defective or unauthorized consolidation may be validated by a legislative ratification or recognition.<sup>3</sup>

**§ 1281. Status of holders of the old stock.**—Although it is said that if the consolidation be lawfully effected, the shareholders of the constituent companies become shareholders of the new,<sup>4</sup> still it is probably more near the fact, that the holders of stock in the original companies do not become *ipso facto* stockholders in the consolidated company, but only have the right to become

<sup>95</sup> Southgate v. Atlantic, etc. R. Co. (1875), 61 Mo. 90.

<sup>96</sup> Kinion v. St. Louis, etc. R. Co., St. Louis Ct. App. No. 4440, not yet reported, but cited by S. D. Thompson, judge of that court, in 31 Cent. L. J. 4.

<sup>97</sup> Philadelphia, etc. R. Co. v. Howard, 13 How. 307, 333.

<sup>98</sup> Columbus, etc. R. Co. v. Skidmore, 69 Ill. 566. This is very doubtful, however, unless the corporation has done something which creates an estoppel, the doing of which is proved. S. D. Thompson in 31 Cent. L. J. 4.

<sup>99</sup> Columbus, etc. R. Co. v. Skidmore, 69 Ill. 566.

<sup>1</sup> Collins v. Chicago, etc. R. Co., 14 Wis. 492.

<sup>2</sup> Collins v. Chicago, etc. R. Co., 14 Wis. 492. Cf. Hobart v. Chappelle, 14 Ind. 601; Commonwealth v. Atlantic, etc. R. Co., 53 Pa. St. 9, 19.

<sup>3</sup> *Vide supra*, § 1267; Bishop v. Brainerd, 28 Conn. 289; Mead v. New York, etc. Co., 45 Conn. 199; McAuley v. Columbus, etc. R. Co., 83 Ill. 348; Mitchell v. Deeds, 49 Ill. 416, 95 Am. Dec. 621.

<sup>4</sup> Ridgway Township v. Griswold, 1 McCrary, 151.

so, by surrendering their old shares.<sup>5</sup> Moreover, a member can not be compelled to accept the stock of another company for his interest, a consolidation of the two having been made,<sup>6</sup> though he may not be able to prevent the consolidation.<sup>7</sup> In England, agreements or provisions respecting the transfer of the business of one company to another, commonly provide for the shareholders in the transferrer company, exchanging their shares in that company for shares of the same number or value in the company to which the transfer is effected. But it is well settled that as to such a transaction as this, a majority of shareholders can not bind a minority to take shares in the transferee company. No individual shareholder in the one, can become a shareholder in the other, but by his own free will, and his own express assent.<sup>8</sup> The statement of the same doctrine in this country is, that in conferring authority to consolidate corporations, the legislature never intended to compel a dissenting stockholder to transfer his interest because a majority of the stockholders consented to the consolidation. Such legislation would impair the obligation of contracts and therefore be invalid; consequently there is no power to force a stockholder of the old corporation to join the new corporation and to receive stock in it, on the surrender of his stock in the old company.<sup>9</sup> Where a consolidation was made on the basis of equality between the shares of the two corporations, plaintiffs held bonds, issued by one of the corporations, convertible into its stock on completion of its road; and it was held that they were entitled to demand stock in the new corporation,—as for the purposes of this contract the old corporation continued under the new name.<sup>10</sup> And it has also been held that a statute, authorizing three-fifths of the stockholders of two gas-light companies to effect a consolidation, did not authorize them to place stock of non-

<sup>5</sup> Wood's Ry. Law, 1686, citing Philadelphia, etc. R. Co. v. Catawissa R. Co., 50 Pa. St. 20; McCray v. Junction R. Co., 9 Ind. 358. But see Cork, etc. Ry. Co. v. Paterson, 18 Com. B. 414; "Consolidation of Corporations," by S. D. Thompson (1890), 31 Cent. L. J. 4.

<sup>6</sup> Frothingham v. Barney, 13 Hun, 366.

<sup>7</sup> McVicker v. Rose (1869), 55 Barb. 247.

<sup>8</sup> Los' Case, 13 W. R. 883;

Higg's Case, 2 H. & M. 657; Martin's Case, 2 H. & M. 699; *Ex parte Bagshaw*, L. R. 4 Eq. 341; *In re London, etc. Bank*, 15 W. R. 1057.

<sup>9</sup> Clearwater v. Meredith, 1 Wall. 39; Gardner v. Hamilton, 33 N. Y. 421.

<sup>10</sup> Day v. Worcester, N. & R. R. Co. (1890), 151 Mass. 302, 23 N. E. Rep. 724; following John Hancock, etc. Co. v. Worcester, etc. R. Co. (1889), 149 Mass. 214.

participating stockholders on a footing inferior to their own, or to transfer their rights to third persons, without their consent.<sup>11</sup>

**§ 1282. Exchange of new stock for old.**—When two corporations are consolidated, no doubt, for most purposes, they cease to exist; and the new corporation is a distinct person in the eye of the law, although it is their "legal successor."<sup>12</sup> But so far as the legislature sees fit, it may direct that the new corporation shall be regarded as the same with one, or even alternately as the same with each, of the old ones; or, more explicitly, that, although the new corporation is a new person, for the acquisition of new rights or the making of new contracts, the old corporations shall not be altogether ended, but shall continue under the new name, so far as to preserve all their existing obligations unchanged.<sup>13</sup> If that is made a condition of the consolidation, the consolidating companies remain in existence to that extent. And it is immaterial whether the statute expressly so provides, or whether it be necessarily implied. And, in a case in point it was said: "There is no greater legal difficulty in continuing the liability upon a contract to exchange stock for the bonds, than there is for continuing it upon one to pay money for them. In neither case does the legislature say, in terms, that the old corporation shall be taken to remain in existence for this purpose; but, if it requires the end, it implies the means. *Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud.*"<sup>14</sup> Therefore, where a statute consolidating two corporations provided that the new corporation should be subject to all the duties, restrictions, obligations, debts, and liabilities to which, at the time of the union, either of said corporations is subject, and that all claims and contracts against either corporation may be enforced by suit or action against the new corporation; and the consolidation was made on the basis of equality between the shares of the two corporations; the plaintiffs who held bonds, issued by one of the corporations, convertible into its stock on completion of its road, were entitled to demand stock in the new corporation,—as

<sup>11</sup> *Fee v. New Orleans Gas Light Co.*, 35 La. Ann. 413.

<sup>12</sup> *Graham v. Railroad Co.*, 118 U. S. 161, 180; *Day v. Worcester, etc. R. Co.* (1890), 7 Ry. & Corp. L. J. 447.

<sup>13</sup> *Compton v. Railway Co.*, 45 Ohio St. 592, 618; *Day v. Worcester, etc. R. Co.* (1890), 151

Mass. 302, 7 Ry. & Corp. L. J. 447.

<sup>14</sup> *Broughton v. Pensacola*, 93 U. S. 266, 269, 270; *Bank v. Harris*, 118 Mass. 147, 151; *Coffey v. Bank*, 46 Mo. 140, 143; *Board v. Gas Light Co.*, 40 La. Ann. 382; *Day v. Worcester, etc. R. Co.* (1890), 151 Mass. 302, 7 Ry. & Corp. L. J. 447.

for the purposes of this contract the old corporation continued under the new name.<sup>15</sup> This fairly extends a former holding that, whether or not the plaintiff was entitled to demand stock in the new corporation, he was entitled to hold the new corporation to its predecessor's contract, and on refusal to deliver stock either in the new or old corporation, on demand, plaintiff could recover from the new corporation the damages provided for.<sup>16</sup> Actual

<sup>15</sup> *Day v. Worcester, etc. R. Co.* (Mass. 1890), 7 Ry. & Corp. L. J. 447; *John Hancock Ins. Co. v. Worcester, etc. R. Co.*, 149 Mass. 214.

<sup>16</sup> *John Hancock Ins. Co. v. Worcester, etc. R. Co.* (1889), 149 Mass. 214. In *Day v. Worcester, etc. R. Co.* (Mass. 1890), 7 Ry. & Corp. L. J. 447, the court said: The argument for the defendants tacitly assumes that the Nashua & Rochester Railroad Company has ceased to exist, to all intents and purposes, and concludes that therefore there is no longer an obligation to deliver stock for the bonds—a conclusion which would follow by the premise which we have conceded. But the very point decided in the case of *John Hancock Insurance Company* was that, by the true construction of the consolidating act, the Nashua & Rochester Railroad Company has not ceased to exist, but that for the present purposes the defendant is that company, with a different name. Assuming, for the moment, that this construction is correct, there can be no question of the power of the legislature to authorize a consolidation upon those terms. A change of name, an acquisition of new property and rights, or both together, do not necessarily make a change of person. To add another illustration to those suggested formerly: If the legislature authorizes one railroad, which has issued bonds like the present, to buy the franchises, property and stock of another, and to issue new stock of

its own to an equal amount, with an express proviso that the identity of the purchasing road shall remain unchanged, and thereupon the purchase is made, we conceive that there can be no doubt that the purchasing road is still bound to deliver stock for bonds, as before. If the bondholder could not complain of the increased issue, *Pratt v. Telephone Co.*, 141 Mass. 225, it is very certain that the company could not, and least of all on the ground that it was no longer the same company. *Banking Co. v. Georgia*, 92 U. S. 665. See *New Bedford R. Co. v. Old Colony R. Co.*, 120 Mass. 397, 400. In the case supposed, the identity of the purchasing road remains unchanged for all purposes. But the law is equally familiar with the preservation of identity for a particular purpose when in other respects it is changed. More than that, it is familiar with an identification of natural persons, which, of course, is wholly feigned, for the preservation and transmission of rights and duties. The "heir is the same person as his ancestor." *Oates v. Frith*, Hob. 130; *Bain v. Cooper*, 1 Dowl. (N. S.) 11, 14. Executors "represent the person of the testator." St. 9 Edw. III. St. 1, ch. 3; *Co. Litt.*, § 337; *Coghil v. Fellove*, 3 Mod. 326; *Bain v. Cooper*, 1 Dowl. (N. S.) 130. Administrators "represent the estate" of their intestate. *North v. Butts*, 2 Dyer, 139b, 140a. Even assigns got the benefit of a warranty to which they were not parties, by an at-

transfer to the new company of the certificates of shares in the old, and issue in lieu thereof of certificates in the new company, is an unnecessary form, where there is other proof of dissolution of the original companies, and transfer of their stock, prop-

tenuated form of the same notion. *Norcross v. James*, 140 Mass. 188, 189. Similar illustrations are referred to in *Compton v. Railway Co.*, 45 Ohio St. 591, 616. To our mind the only really debatable point is not what the legislatures of New Hampshire and Massachusetts could do as against the consolidating companies, but what they did in fact; that is, what is the true construction of the words of the New Hampshire statute of 1883, ch. 239, and of our statute of 1883, ch. 129; *Railroad Co. v. Georgia*, 98 U. S. 359, 362; *Banking Co. v. Georgia*, 92 U. S. 665, 670. Upon that point we always have recognized that different minds might form different opinions. To justify our own it is unnecessary to repeat the very sweeping language of the statute, which seems to be as broad as could have been used had the legislatures had this particular obligation in mind. The question is not whether words, on their face insufficient, should be stretched by construction to embrace the obligation in the bonds. It is whether the words "all the obligations, debts and liabilities," "all claims and contracts," etc., shall be cut down upon some extrinsic reason. We find no such reason. On the contrary, every extrinsic fact is in favor of giving its natural meaning to the laboriously comprehensive language of the acts. The road of the obligor was let to the Worcester & Nashua Railroad before it was built, by authority of statute. The statute which authorized the issue of these bonds, and required them to be convertible into stock, also required the Worcester & Nashua Railroad to guaranty them, and it

did so. It paid the interest upon them directly to the bondholders, and its lease was changed so as to require it to do so. Afterwards it brought about an exchange of the original bonds for others, at a lower rate of interest, but otherwise like the old ones, and mortgaged its road as additional security for them. In 1875 the Worcester & Nashua Railroad was authorized to purchase the bonds and stock of the obligor, providing for the continued exchange of stock for bonds on presentation. Finally the last step was taken of authorizing a consolidation on terms of perfect equality, which was carried out. Under the existing relations of the companies it was little more than a formal act. In view of the fact that every step taken was in pursuance of special legislation; it is not to be believed that the most important obligations which there were outstanding were forgotten, or were not contemplated. It is probable that this particular feature of them, which has been protected in 1875, was before the mind of the legislature. The effect of consolidation—if, as we must assume, the terms prescribed and assented to were just—was simply to bring together two groups of shares of equal value. Justice to the bondholders forbade allowing the Nashua & Rochester Railroad to extinguish itself to their detriment. No injustice was done to stockholders by continuing its existence under the altered name. We must decide a second time, that for the purpose of continuing the obligation of these bonds in existence according to their tenor, the defendant is the Nashua & Rochester Railroad Company.

erty, and franchises, to the consolidated company.<sup>17</sup> The surrender of certificates of stock of the original company as provided by statute, and issue in lieu thereof, of shares in the consolidated corporation operates to surrender the charter of the original corporation.<sup>18</sup> A statute authorizing consolidation of corporations, and merger of all the property and franchises of the component companies, gives no power to the managers to take away or destroy the vested rights of the stockholders of the old companies, by issue and exchange of stock in the new corporation for stock in the old, against their assent. This is not a taking of private property for public use.<sup>19</sup>

**§ 1283. Rights of consolidated companies.**—The consolidated company becomes vested with all the powers, franchises and immunities of the component companies.<sup>20</sup> In New York it is enacted, that the consolidated company, in addition to the general powers of corporations, shall enjoy the rights, franchises and privileges possessed by each of the constituent companies, subject to the restrictions, liabilities, duties and provisions imposed by law, so far as the same may be applicable to the purposes for which it shall have been organized, and expressed in the agreement for consolidation, and may prosecute or carry on any kind of business which each of the consolidating corporations was authorized by law to conduct.<sup>21</sup> Independently of statutory regulation, it is well settled that where two or more companies form,

<sup>17</sup> State v. Butler, 86 Tenn. 614, 8 S. W. 586.

<sup>18</sup> Keokuk, etc. Co. v. Missouri, 152 U. S. 301; Ashley v. Ryan, 49 Ohio St. 504.

<sup>19</sup> Rabe v. Dunlap, 51 N. J. Eq. 40 (1893), 25 Atl. 929.

<sup>20</sup> Consolidated Gas Co. v. Baltimore, etc. Co. (Md. 1904), 57 Atl. 29.

<sup>21</sup> N. Y. Laws 1890, ch. 567, § 15. And in England a similar statute provides that in every case of amalgamation, the undertaking, railways, harbors, navigations, ferries, wharfs, canals, works, real and personal property, powers, authorities, privileges, exemptions, rights of action and suits, and all other the rights and interests of the dissolved company, shall, subject to the contracts, obligations,

debts, and liabilities of that company, become at the time of amalgamation, and by virtue of the amalgamating act, vested in the amalgamated company, and may and shall be held, used, exercised and enjoyed by the amalgamated company in the same manner and to the same extent as the same respectively at the time of amalgamation are, or if the amalgamating act were not passed might be, held, used, exercised, and enjoyed by the dissolved company. 26 & 27 Vic., ch. 92, § 38. The same act makes all special statutes relating to or affecting the dissolved applicable to the amalgamated company unless repealed by the special act authorizing the amalgamation. 26 & 27 Vic., ch. 92, § 38.

by union or consolidation, a new or consolidated company, the latter, unless restricted by the laws under which the consolidation takes place, succeeds to and possesses the franchises, rights, privileges, and immunities of the several companies from which it is formed.<sup>22</sup> Accordingly, it is said that "where a new corporation is formed out of two or more previously existing corporations, and by the act creating, it is to enjoy and have all the powers, privileges and immunities possessed by each of the corporations whose union constitutes such new corporation, the new corporation will have privileges, powers and immunities which they *all* (i. e., every one of them all) had, and it will not have those special powers, privileges and immunities which some had and some did not have."<sup>23</sup> Where the act of consolidation provided that the new company should, "for its government, be entitled to all the powers and privileges, and be subject to all restrictions and liabilities, conferred and imposed" upon another company, the phrase, "for its government," is held to have been intended, not as a limitation of its powers, but for its regulation and control.<sup>24</sup> The consolidation of several corporations into one, creates a new corporation, the rights of which are dependent on the laws governing corporations at the time of the consolidation, and on the act authorizing it.<sup>25</sup> The new company may, of course, mortgage the entire property acquired by consolidation.<sup>26</sup>

**§ 1284. Consolidation after municipal aid is voted.**—In case of authorized consolidation after municipal aid has been voted, and before payment of the subscription, the bonds may be sold for benefit of the consolidated corporation,<sup>27</sup> but if consolidated before the subscription is made, it can not be enforced.<sup>28</sup> The municipality is not released, by the consolidation, from obligation to deliver the bonds.<sup>29</sup> Where a railroad receiving local aid,

<sup>22</sup> *Zimmer v. State*, 30 Ark. 677, R. Co., 6 Gill, 288, 48 Am. Dec. 531; *Tomlinson v. Branch*, 15 Wall. 460. *Acc. Tennessee v. Whitworth*, 117 U. S. 147; *Green County v. Conness*, 109 U. S. 104; *Indianapolis, etc. R. Co. v. Jones*, 29 Ind. 465, 95 Am. Dec. 654; *Miller v. Lancaster*, 5 Coldw. 514; *Paine v. Lake Erie, etc. R. Co.*, 31 Ind. 283; *Cooper v. Corbin*, 105 Ill. 224.

<sup>23</sup> *State v. Maine Central R. Co.*

(1876), 66 Me. 488, 514, *per* Appleton, C. J.

<sup>24</sup> *Tennessee v. Whitworth*, 117 U. S. 139.

<sup>25</sup> *Charlotte, etc. R. Co. v. Gibbes* (1888), 27 S. C. 385.

<sup>26</sup> *Mead v. New York, etc. R. Co.*, 45 Conn. 199.

<sup>27</sup> *Scotland Co. v. Thomas*, 94 U. S. 682 (1876).

<sup>28</sup> *Edwards v. Bates County*, 117 Fed. 596 (1902).

<sup>29</sup> *Morril v. Smith County*, 89 Tex. 529 (1896), 36 S. W. 56.

afterward removes its tracks, the municipality may recover the amount of the aid furnished.<sup>30</sup> A consolidated corporation succeeds to the power of any one of the constituent companies to give mortgages,<sup>31</sup> and such mortgage may have precedence over the unsecured obligations of the consolidating companies.<sup>32</sup>

**§ 1285. Rights of new company to the properties of the old.** Whether or not so provided in the statute authorizing incorporation, or expressed by the agreement to consolidate, the title to the properties and franchises of the original companies, passes to, and is vested in, the consolidated company *eo instanti* upon the consolidation.<sup>33</sup> The consolidated corporation is presumed to be subject to the same burdens and entitled to the same privileges and exemptions as the component companies, in the absence of any contrary legislative provision in the act authorizing consolidation.<sup>34</sup> Where one corporation goes entirely out of existence, by being consolidated or merged into another, and no arrangements are made respecting the property and liabilities of the extinguished corporation, the one newly created will be entitled to all the property.<sup>35</sup> The New York "Business Corporation Law" of 1890, provides that upon the consolidation and organization of the new corporation, all and singular the rights, privileges, franchises and interests of every kind belonging to or enjoyed by the corporations so consolidated, and every species of property, real, personal and mixed, and things in action thereunto belonging, mentioned in such agreement of consolidation, shall be deemed to be transferred and vested in, and may be enjoyed by such new corporation, without any other deed or transfer; and such new corporation shall hold and enjoy the same and all rights of property, privileges, franchises and interests in the same manner and to the same extent as if the several corporations so consolidated had continued to retain the title and transact the business of such corporations, and the title to real and personal estate and rights and privileges acquired and enjoyed by either of the

<sup>30</sup> *Town of Hinckley v. Kettle, etc. R. R.* (1897), 70 Minn. 105, 72 N. W. 835.

<sup>31</sup> *Dupont v. Northern Pac. R. R. Co.* (1883), 18 Fed. 467.

<sup>32</sup> *Wabash, etc. Ry. Co. v. Ham* (1885), 114 U. S. 587.

<sup>33</sup> *Mansfield, etc. Co. v. Stout*, 26 Ohio St. 241.

<sup>34</sup> *Minneapolis, etc. R. Co. v. Gardner*, 177 U. S. 332.

<sup>35</sup> *Philadelphia, etc. Co. v. Maryland*, 10 How. (U. S.) 376; *Central R. & B. Co. v. Georgia*, 92 U. S. 665; *Maine Central R. Co. v. Maine*, 96 U. S. 499; *New Orleans, etc. Co. v. New Orleans Mfg. Co.*, 115 U. S. 650; *Thompson v. Abbott*, 61 Mo. 176.

corporations shall not revert or be impaired by such consolidation, or anything relating thereto.<sup>36</sup> Thus in an Alabama case, a railroad company was incorporated, and its existence was limited to fifty years. A person conveyed a strip of land of the usual width to the company, on which the tracks were afterwards laid; the *habendum* clause limiting the term to fifty years, or so long as the charter of said company might continue. The act of incorporation was afterward amended so as to permit the State to purchase the company's property at the end of the fifty years, and if no such election was then made the charter was to be continued for ten years, with a like option at each recurrence of that period. Still later, the same grantor conveyed the land, including said strip, together with the reversion therein, to plaintiff's ancestor. All the rights of the railroad company became vested in the defendant corporation by judicial sale. The original act incorporating the railroad company authorized condemnation of

<sup>36</sup> N. Y. Laws, 1890, ch. 567, § 16. The English Railways Clauses Act of 1863, enacts that, "except as may be otherwise provided in the special act, all debts and money due from or to the dissolved company, or any persons on their behalf, shall be payable and paid by or to the amalgamated company (26 & 27 Vic., ch. 92, § 40); that all tolls, rates, duties and money due or payable by virtue of any act relating to the dissolved company from or to that company shall be due and payable from or to the amalgamated company, and shall be recoverable from or by the amalgamated company, by the same ways and means and subject to the same conditions as the same would or might have been recoverable from or by the dissolved company if the amalgamating act had not been passed (26 & 27 Vic., ch. 92, § 40); that all deeds, conveyances, grants, assignments, leases, purchases, sales, mortgages, bonds, covenants, and securities which before the amalgamation have been executed, made or entered into by, with, to, or in relation to the dissolved

company or the directors thereof, and which are in force at the time of amalgamation, and all obligations and liabilities which before the amalgamation have been incurred by or to, or which but for the amalgamation might or would have arisen in relation to, the dissolved company, or the directors thereof, shall be as valid and of as full effect in favor of, against, or in relation to the amalgamated company, as if the same had been executed, made, or entered into by, with, or to, or in relation to, or had been incurred by or to or had arisen in relation to, the amalgamated company by name, (26 & 27 Vic., ch. 92, § 41); that all causes and rights of action or suit accrued before the time of amalgamation, and then in any manner enforceable by, for, or against the dissolved company shall be and remain as good, valid, and effectual for or against the amalgamated company as they would or might have been for or against the dissolved company affected thereby, if the amalgamating act had not been passed" (26 & 27 Vic., ch. 92, § 42).

land in case the company and the owner could not agree on the price thereof. The identical company ceased to own or use the land in controversy, but it had been continually used for railroad purposes by the successors in title of the first company. That company was never judicially dissolved, though it ceased to do business. Upon this state of facts it was decided that the estate was not terminated by the lapse of the fifty years, or by the fact that the company had ceased to do business, as the continuance of the charter referred to in the deed meant the continuance of the chartered rights or privileges, which still existed, though exercised by another body corporate.<sup>37</sup> Where two or more companies are consolidated the new one may enforce the rights of the old ones.<sup>38</sup> All the choses in action of the old companies are transferred to the newly created company and may be enforced by it in its own name,<sup>39</sup> and only in its own name.<sup>40</sup> Thus the new corporation may lawfully use a patented axle-box which both the old corporations had been licensed to use.<sup>41</sup> The stockholders of a defendant company voted to consolidate its business with a tannery owned by the plaintiffs in another State. That vote was carried out to the extent of transferring the personal property of the foreign tannery to the defendant corporation, but not the realty. Upon cession of business and an accounting, it was held that whether the purchase of real property in another State was within the powers of the company or not, it should account for the actual value of the personality it received.<sup>42</sup>

**§ 1286. Duties of the new company to the public. Its rates restricted.**—The new company must perform all the public obligations of the old, as for instance, the obligations of a common carrier,<sup>43</sup> and the purchasing or consolidated company becomes subject to restrictions upon charges for transportation, as to that part of its traffic which is conducted over the purchased road.<sup>44</sup> This is provided by a statute in New York, which declares that nothing in this act contained shall be so construed as to allow

<sup>37</sup> Davis v. Memphis, etc. R. Co. (1889), 87 Ala. 633.

<sup>41</sup> Lightner v. Boston, etc. R. Co., 1 Low. 338.

<sup>38</sup> University of Vermont v. Baxter, 42 Vt. 99.

<sup>42</sup> Moore v. Swanton Tanning Co. (1888), 60 Vt. 459.

<sup>39</sup> Cumberland College v. Ish, 22 Cal. 641; Miller v. Lancaster, 5 Coldw. 514; University of Vermont v. Baxter, 42 Vt. 99.

<sup>43</sup> Peoria, etc. R. Co. v. Coal Val. Min. Co., 68 Ill. 489.

<sup>40</sup> Indianola R. Co. v. Fryer, 56 Tex. 609; University of Vermont, etc. v. Baxter, 42 Vt. 99.

<sup>44</sup> Campbell v. Marietta, etc. R. Co., 23 Ohio St. 168. Cf. Daniels v. St. Louis, etc. R. Co., 62 Mo. 43.

the consolidated company to charge a higher rate of fare per passenger per mile upon any part or portion of the consolidated line, than is now allowed by law to be charged by each existing company respectively.<sup>45</sup> And in England the same tolls are to be calculated and imposed at such rate, as if the amalgamated railways had originally formed one line.<sup>46</sup> As though in consideration for undertaking the above duties, the consolidated company acquires the public rights of the original companies, including even that of eminent domain.<sup>47</sup> And it may therefore continue condemnation proceedings for the acquisition of right of way begun by the original corporations.<sup>48</sup> But, under the laws of Alabama, the power of a railroad company to acquire land in aid of the construction of its road, will not pass to a consolidated corporation of which it forms a part, unless its line, when completed according to its charter, will form a continuous track with those of the other constituents of the consolidated corporation, so as to admit of the passage of trains without break or interruption; the code providing that railroad companies whose tracks, when completed, admit the continuous passage of cars, without break or interruption, may consolidate themselves into one corporation, which shall possess all the powers, rights, and franchises of its constituent members.<sup>49</sup> Appropriations made to one of the original companies, are payable to the new.<sup>50</sup> And an exemption from jury duty enjoyed by the officers of the old companies, vests in those of the new.<sup>51</sup> The new corporation does not acquire an exemption from taxation,<sup>52</sup> or any other exemption, unless the legislature so expressly provides.<sup>53</sup>

**§ 1287. Liabilities of the new company.**—The extent of the liability of the new company is at least equal to the property

<sup>45</sup> N. Y. Laws of 1869, ch. 917, § 7; N. Y. Laws of 1875, ch. 108, § 1, as amended by N. Y. Laws of 1883, ch. 387.

<sup>46</sup> 8 Vic. ch. 20, § 91.

<sup>47</sup> South Carolina R. Co. v. Blake, 9 Rich. 288, 233; Trester v. Missouri Pac. R. Co., 33 Neb. 171.

<sup>48</sup> Kip v. New York, etc. R. Co., 67 N. Y. 227; Toledo, etc. Ry. Co. v. Dunlap, 47 Mich. 456.

<sup>49</sup> Georgia Pac. Ry. Co. v. Gaines (Ala. 1890), 7 So. Rep. 382, follow-

ing Georgia Pac. R. Co. v. Wilks (1889), 86 Ala. 479.

<sup>50</sup> Scott v. Hansheer, 94 Ind. 1.

<sup>51</sup> Zimmer v. State, 30 Ark. 677. See, also, Fisher v. New York, etc. R. Co., 46 N. Y. 644.

<sup>52</sup> Phœnix, etc. Ins. Co. v. Tennessee, 161 U. S. 174; Memphis, etc. Co. v. Railroad Comm'rs, 112 U. S. 609; St. Louis, etc. Ry. Co. v. Berry, 113 U. S. 465; Chesapeake, etc. Co. v. Miller, 114 U. S. 176.

<sup>53</sup> Tennessee v. Wittmorth, 117 U. S. 129; State v. Phila. etc. Co., 45 Md. 361, 24 Am. Rep. 511.

derived by it from each of its constituent parts.<sup>54</sup> For the property of the constituent companies passes into the hands of the new company, as a taker with notice, charged with the payment of the debts of the old company.<sup>55</sup> And equity will scrutinize with jealousy and arrangement among corporations, whereby the assets of an insolvent corporation, which are a trust fund for its creditors, are turned over to another corporation, frittered away, or otherwise diverted from the creditors who have the equitable charge upon it,<sup>56</sup> and will enforce the creditors' claims against the property of the old corporation in the hands of the new;<sup>57</sup>—where, by the statute authorizing the consolidation, the creditor's remedy at law is not complete.<sup>58</sup> An action will lie against the new company upon any liability in contract or tort, of any of the constituent corporations,—it is not necessary to proceed in equity.<sup>59</sup> The general rule is, that the consolidated corporation becomes liable for all the debts, contracts and torts of the old companies,<sup>60</sup> and with presumed notice of the rights of creditors,<sup>61</sup> and regardless of any statutory provision on the subject.<sup>62</sup> In the absence of express statutory provision, the new corporation which takes the property of the old corporations, impliedly assumes all their contract liabilities.<sup>63</sup> Whether the new corporation shall be

<sup>54</sup> *Harrison v. Arkansas, etc. R. Co.*, 4 *McCrary*, 264; *Brum v. Merchants', etc. Ins. Co.*, 16 Fed. Rep. 140; *Hibernia Ins. Co. v. St. Louis, etc. Transportation Co.*, 13 Fed. Rep. 516; *Prouty v. Lake Shore, etc. Ry. Co.*, 52 N. Y. 363; *Booth v. Bunce*, 33 N. Y. 139, 88 Am. Dec. 372; *Barclay v. Quicksilver Mining Co.*, 9 Abb. Pr. N. S. 283. Cf. *Kelly v. Mariposa, etc. Co.*, 4 *Hun*, 632.

<sup>55</sup> *Brum v. Merchants' Mutual Ins. Co.*, 16 Fed. Rep. 140; *Hibernia Insurance Co. v. St. Louis, etc. Transp. Co.*, 3 *McCrary*, 398. Cf. *Bent v. Hart*, 73 Mo. 641, affirming 10 Mo. App. 143.

<sup>56</sup> *Patton v. Tribilcock*, 91 U. S. 47; *Alexander v. Relfe*, 74 Mo. 495.

<sup>57</sup> *Harrison v. Arkansas Valley R. Co.*, 4 *McCrary*, 264, 13 Fed. 522.

<sup>58</sup> *Arbuckle v. Illinois Midland Ry. Co.*, 81 Ill. 429; *United, etc.*

*Canal Co. v. Happock*, 28 N. J. Eq. 261.

<sup>59</sup> *Langhorne v. Richmond Ry. Co.*, 91 Va. 369, 22 S. E. 357; *Western Union R. Co. v. Smith*, 75 Ill. 496; *Sapington v. Little Rock, etc. Co.*, 37 Ark. 23; *Indianapolis, etc. Co. v. Jones*, 29 Ind. 465, 95 Am. Dec. 654.

<sup>60</sup> *Tomlinson v. Branch*, 15 Wall. (U. S.) 460.

<sup>61</sup> *Central, etc. Co. v. Georgia*, 92 U. S. 665; *Louisville, etc. Ry. v. Boney*, 117 Ind. 501, 3 L. R. A. 435; *Berry v. Kansas City, etc.*, 52 Kan. 774, 39 Am. St. Rep. 381.

<sup>62</sup> *Vide supra*, § 1252, and *vide* 23 L. R. A. 231, liability of the new company; *Paine v. Lake Erie, etc. R. Co.*, 31 Ind. 283; *Philadelphia v. Ridge, etc. Co.*, 143 Pa. St. 444, 22 Atl. 695; *Louisville v. Boney*, 117 Ind. 501, 3 L. R. A. 435; *Cleveland, etc. Co. v. Prewitt*, 134 Ind. 557.

<sup>63</sup> *Mount Pleasant v. Beckwith*,

liable on all the contract of the old corporations, or liable only to a certain extent, depends upon the terms of the statute authorizing consolidation.<sup>64</sup> In case the old corporation goes entirely out of business, and becomes merged into the new, it will succeed to all the property and become answerable for all its liabilities.<sup>65</sup> Under the Illinois statute, making a consolidated corporation liable for pre-existing debts or liabilities of any one of the constituent companies, a consolidated railroad company is liable on a judgment rendered against any of the constituent companies after consolidation.<sup>66</sup> The assets of the old companies may be followed in equity, as trust funds, into the hands of the new, and the new company takes with notice of the trust.<sup>67</sup> But as a mortgage foreclosure cuts off the antecedent general indebtedness of the mortgagor, such debts will not follow the property where the consolidation takes place subsequently to such a foreclosure.<sup>68</sup> And so it has been held that a mortgage, given by the consolidated company upon all the property under its control, is superior to the claims of the unsecured creditors of the company from which that property was derived.<sup>69</sup> The consolidated company may be expressly required, however, to assume all the debts of its constituent parts, without regard to the sufficiency of the property derived from them to satisfy the claims.<sup>70</sup> The New York "Business Corporation Law" of 1890 enacts that the rights of creditors of any corporation that shall be so consolidated, shall not in any manner be impaired nor any liability or obligation for the payment of any money due or to become due to any person or persons, or any claim or demand for any cause existing against any such corporation or against any stockholder thereof, be released or impaired by any such consolidation; but such new corporation shall succeed to and be held liable to pay and discharge all such

100 U. S. 519; Pullman Palace Car Co. v. Missouri Pacific Ry. Co., 115 U. S. 587; Louisville, etc. Co. v. Boney, 117 Ind. 501, 3 L. R. A. 435; Berry v. Kan. City, etc. Co., 52 Kan. 759, 774, 39 Am. St. Rep. 371, 381.

<sup>64</sup> Polhemus v. Fitchburg R. Co., 123 N. Y. 502.

<sup>65</sup> Thompson v. Abbott, 61 Mo. 176.

<sup>66</sup> Chicago, etc. Co. v. Ferguson (1903), 106 Ill. App. 356.

<sup>67</sup> Harrison v. Arkansas Valley

R. Co., 4 McCrary, 264; Barksdale v. Finney, 14 Gratt. 338; Montgomery, etc. R. Co. v. Branch, 59 Ala. 139; The Key City, 14 Wall. 653; Powell v. North Missouri R. Co., 42 Mo. 63.

<sup>68</sup> Houston, etc. R. Co. v. Shirley, 54 Tex. 125.

<sup>69</sup> Tysen v. Wabash R. Co., 15 Fed. Rep. 763.

<sup>70</sup> Warren v. Mobile, etc. R. Co., 49 Ala. 582; Western Union R. Co. v. Smith, 75 Ill. 496.

debts and liabilities of each of the corporations consolidated, in the same manner as if such new corporation had itself incurred the obligation or liability to pay such debt or damages; and the stockholders or the respective corporations consolidated, shall continue, subject to all the liabilities, claims and demands existing against them as such, at or before the consolidation; and no action or proceeding then pending (before any court or tribunal in which any corporation that may be so consolidated is a party, or in which any such stockholder is a party), shall abate or be discontinued by reason of such consolidation, but may be prosecuted to final judgment, as though no consolidation had been entered into; or such new corporation may be substituted as a party in place of any corporation so consolidated, by order of the court in which such action or proceeding may be pending.<sup>71</sup> Without a statute, however, and unless otherwise provided in the statute authorizing a consolidation, or by the terms of agreement between the companies, the consolidated corporation assumes all the liabilities of the companies composing it, and they may be enforced by proceedings against the new company.<sup>72</sup> Liabilities of the

<sup>71</sup> N. Y. Laws 1890, ch. 567, § 17.

<sup>72</sup> Harrison v. Union Pacific R. Co., 13 Fed. Rep. 622, 15 Fed. Rep. 563; Tysen v. Wabash R. Co., 11 Biss. 510; Western R. Co. v. Davis, 66 Ala. 578; Sappington v. Little Rock, etc. Ry. Co., 37 Ark. 23; Slattery v. St. Louis, etc. Trans. Co., 91 Mo. 217., 60 Am. Rep. 245; Thompson v. Abbott, 61 Mo. 176; Miller v. Lancaster, 5 Coldw. 514, 520; Columbus, etc. Ry. Co. v. Powell, 40 Ind. 37; Indianapolis, etc. R. Co. v. Jones, 29 Ind. 465; Columbus, etc. R. Co. v. Skidmore, 69 Ill. 566, 95 Am. Dec. 654; Caley v. Coburg, etc. R. Co., 14 Grant. (U. C.) 531. See Houston, etc. R. Co. v. Shirley, 54 Tex. 125; Warren v. Mobile, etc. R. Co., 49 Ala. 582. But see Shaw v. Norfolk County R. Co., 16 Gray, 407. Cf. Chase v. Vanderbilt, 5 Jones & Sp. 334. But it is held in the case of railroads that a statute providing that in case of the consolidation of two or more companies, the new corporation shall be liable for all the

debts of each company entering into the arrangement, applies only to companies which may thereafter consolidate. Wood's Ry. Law, 1682; Hatcher v. Toledo, etc. R. Co., 62 Ill. 477. And it is held also that where two railroads are consolidated, as far as one of the creditors of one of the original companies is concerned, the consolidated company is the successor of the old company, but in respect to the properties of the other companies it is a new and independent company, and such a creditor has no claim against it upon the original contract, but only by virtue of its assumption of the obligation of the old companies. Boardman v. Lake Shore, etc. Ry. Co., 84 N. Y. 157, 181; Chase v. Vanderbilt, 62 N. Y. 307; Prouty v. Lake Shore, etc. Ry. Co., 52 N. Y. 363; Houston, etc. R. Co. v. Shirley, 54 Tex. 125. Cf. Sage v. Lake Shore, etc. Ry. Co., 70 N. Y. 220.

old companies may be enforced by direct actions against the new;<sup>73</sup> therefore where a railroad company, after the execution of promissory notes, is consolidated with another company, and the newly formed company assumes a new name, it may be sued by the name thus assumed, and it will be estopped from denying the name by which it is sued.<sup>74</sup> The statutes of consolidation generally provide, that the old companies shall be deemed to continue in existence for the purpose of preserving remedies, and there are judicial decisions which support this theory where the statute does not expressly so provide.<sup>75</sup> And even where the consolidating statute provides simply that the president of the new company "shall be held in law, as to service of process, as the president of" each of the constituent companies,—an unliquidated claim, as, for example, for personal injuries, may be made the basis of an action against the consolidated company in the first instance.<sup>76</sup> But of course where two or more railroad corporations are consolidated, and the new corporation thus formed assumes the debts and obligations of the original companies, the official representatives individually, of the new organization, are not necessary or proper parties to enforce a liability of one of the old companies. If the plaintiff has a cause of action, it is against the new corporation alone, and not against its individual directors and officers.<sup>77</sup> And it has been held that after a railroad company has consolidated with another as authorized by their charters, and confirmed by legislation conferring all rights, powers and privileges belonging to either, upon the new corporation,—liabilities of either of the old companies can be enforced *only* against the new corpora-

<sup>73</sup> Western, etc. R. Co. v. Smith, 75 Ill. 496; Warren v. Mobile, etc. R. Co., 49 Ala. 582; Pullman Car Co. v. Missouri Pacific R. Co., 115 U. S. 581; Louisville, etc. R. Co. v. Boney, 117 Ind. 501; Thompson v. Abbott, 61 Mo. 176. According to some opinions the remedy is in equity; but the better opinion is that a direct action at law will lie upon an implied *assumpsit*. Warren v. Mobile, etc. R. Co., 49 Ala. 582. In one case it was held that the new company could not be substituted in place of the old, after a referee had reported in favor of judgment against the old, merely for the purpose of having

the judgment entered against it in form—the court reasoning that in some way it was entitled to make a separate defense. Prouty v. Lake Shore, etc. R. Co., 52 N. Y. 363, 368; "Consolidation of Corporations," by S. D. Thompson (1890), 31 Cent. L. J. 4.

<sup>74</sup> Columbus, etc. Ry. Co. v. Skidmore, 69 Ill. 566.

<sup>75</sup> S. D. Thompson in 31 Cent. L. J. 4; State v. Maine Central R. Co., 66 Me. 488, 500.

<sup>76</sup> Warren v. Mobile, etc. R. Co., 49 Ala. 582.

<sup>77</sup> Chase v. Vanderbilt, 62 N. Y. 307.

tion.<sup>78</sup> A case different from the general rule has decided that, when the articles of consolidation provide that the constituent companies shall continue in existence for the purpose of adjusting all claims against them, an unliquidated claim against one of the old companies must be adjudicated in an action against the latter, before it can be enforced against the new corporation.<sup>79</sup>

**§ 1288. Debts of the old companies.**—It is the rule that a consolidated corporation is liable for the debts of the component companies, but it applies only to voluntary consolidation, and not to cases where the corporate property is sold under foreclosure decree to another corporation. In such case, the consolidated corporation is not liable for the debts of the foreclosed corporation, unless made so by statute.<sup>80</sup> The new company succeeds to all the rights, franchises, privileges and immunities, and becomes subject to all liabilities of the constituent companies.<sup>81</sup> Statutes, in nearly all cases, provide that the new company shall acquire the rights and be subject to the liabilities of the old.<sup>82</sup>

<sup>78</sup> Taylor on Corporations, 665; Indianola R. Co. v. Fryer, 56 Tex. 609. Cf. Houston, etc. R. Co. v. Shirley, 54 Tex. 125; People v. Empire, etc. Ins. Co., 92 N. Y. 105.

<sup>79</sup> Whipple v. Union Pacific R. Co., 28 Kan. 474 (an action for personal injuries).

<sup>80</sup> Houston, etc. R. Co. v. Shirley, 54 Tex. 125.

<sup>81</sup> *Vide supra*, § 1260, LIABILITIES OF THE OLD CORPORATIONS; Hancock Mutual Life Ins. Co. v. Worcester, etc. R. Co. (1889), 149 Mass. 214; Abbott v. Railroad Co., 145 Mass. 450, 453; Pullman Car Co. v. Missouri Pacific R. Co., 115 U. S. 587; Baltimore v. Baltimore, etc. R. Co., 6 Gill, 288; Tomlinson v. Branch, 15 Wall. 460; Ridgway Township v. Griswold, 1 McCr. 151; Chicago, etc. R. Co. v. Moffitt, 75 Ill. 524; Miller v. Lennox, 5 Coldw. 514; Atchison, etc. R. Co. v. Phillips County, 25 Kan. 261; Washburn v. Cass County, 3 Dill. 251; Paine v. Lake Erie, etc. R. Co., 31 Ind. 293; Zimmer v. State, 30 Ark. 677; Thomas v. Abbott, 61 Mo. 176; Barksdale v. Finney, 14 Gratt. 338; Harrison v. Ar-

kansas Valley R. Co., 4 McCr. 264; Brum v. Merchants' Mutual Ins. Co., 16 Fed. Rep. 140; Sappington v. Little Rock, etc. R. Co., 37 Ark. 23; Louisville, etc. R. Co. v. Boney, 117 Ind. 501; Selma, etc. R. Co. v. Harbin, 40 Ga. 706; Montgomery, etc. R. Co. v. Boring, 51 Ga. 582; Baltimore, etc. R. Co. v. Musselman, 2 Grant Cas. (Pa.) 348; Lewis v. Clarendon, 6 Reporter, 609; Indianapolis, etc. R. Co. v. Jones, 29 Ind. 465; St. Louis, etc. R. Co. v. Miller, 43 Ill. 199; Peoria, etc. R. Co. v. Coal Valley Mining Co., 68 Ill. 489; Robertson v. Rockford, 21 Ill. 451; Toledo, etc. R. Co. v. Dunlap, 47 Mich. 456; Central R. Co. v. Georgia, 92 U. S. 665; New York, etc. R. Co. v. Saratoga, etc. R. Co., 39 Barb. 289; Daniels v. St. Louis, etc. R. Co., 62 Mo. 43; Bishop v. Brainerd, 28 Conn. 289; Mount Pleasant v. Beckwith, 100 U. S. 519; Pullman Palace Car Co. v. Missouri Pacific Ry. Co., 115 U. S. 587; *Vide* 95 Am. Dec. 654.

<sup>82</sup> Lightner v. Boston, etc. R. Co., 1 Low. 338; Shaw v. Norfolk Co. R. Co., 16 Gray, 407; Western, etc.

Therefore the debts of the old corporation are enforceable against the new.<sup>83</sup> Because, also, when a new corporation is formed by the amalgamation of two or more distinct corporations into one, the new corporation succeeds to all the faculties and rights of the several components, it must, as a necessary consequence, be subject to all the conditions and duties also, imposed by the law of their creation, both as to private persons and the public.<sup>84</sup> For corporations can not, by their own acts, divest themselves of the duties and liabilities imposed upon them by law, the performance of which was the consideration upon which their charters were granted, and which thus entered into their contract with the Commonwealth.<sup>85</sup> So that, as above stated, unless otherwise provided by statute, the new company succeeds to all the rights and liabilities of the old ones.<sup>86</sup> But a creditor of the old com-

R. Co. v. Smith, 75 Ill. 496; Thatcher v. Toledo, etc. R. Co., 62 Ill. 477. The English codified law in the case of railroads is very general and perhaps instructive. It provides that, notwithstanding the dissolution of the dissolved company, and the amalgamation, everything before the time of amalgamation done, suffered, and confirmed, respectively, under or by virtue of any special act relating to the dissolved company, shall be as valid as if the amalgamating act had not been passed; and the dissolution and amalgamation, and the amalgamating act, and this part of this act, respectively, shall accordingly be subject and without prejudice to everything so done, suffered, and confirmed respectively, and to all rights, liabilities, claims, and demands, present or future, which if the dissolution and amalgamation had not taken place, and the amalgamating act had not been passed, would be incident to or consequent on anything so done, suffered, and confirmed respectively; and with respect to all things so done, suffered, and confirmed respectively, and to all such rights, liabilities, claims, and demands, the amalgamated company shall to all intents rep-

resent the dissolved company; and the generality of this present provision shall not be deemed to be restricted by any other of the provisions of this part of this act or by any provision of the amalgamating act that does not expressly refer to this present provision, and expressly restrict the operation thereof. "The Railways Clauses Act of 1863," 26 & 27 Vic. ch. 92, § 55.

<sup>83</sup> Indianapolis, etc. R. Co. v. Jones, 29 Ind. 465; Montgomery, etc. R. Co. v. Boring, 51 Ga. 582; Thompson v. Abbott, 61 Mo. 176.

<sup>84</sup> Tomlinson v. Branch, 15 Wall. 460; Gould v. Langdon, 43 Pa. St. 365.

<sup>85</sup> Quested v. Newburyport Horse R., 127 Mass. 204; McCluer v. Manchester, etc. R., 18 Gray, 124, 74 Am. Dec. 624; Langley v. Boston, etc. R. Co., 10 Gray, 103; Freeman v. Minneapolis, etc. R. Co., 28 Minn. 443. But see Ditchett v. Spuyten Duyvil, etc. R. Co., 67 N. Y. 425. *Of.* Tower Manuf. etc. Co. v. Ullman, 89 Ill. 244.

<sup>86</sup> Chicago, etc. R. Co. v. Moffitt, 75 Ill. 524; Zimmer v. State, 30 Ark. 677; Tennessee v. Whitworth, 117 U. S. 147; Peoria, etc. Ry. Co. v. Coal Valley Mining Co., 68 Ill. 489.

pany is not bound to accept the responsibility of the new, for the old company is deemed to remain in existence for the purposes of actions.<sup>87</sup> As a general rule, corporate creditors have no standing in court to object to the consolidation of the debtor company with other corporations. For the reason that their claims remain a lien upon the property of the company after consolidation as before, and since they are in no wise constrained to relinquish their lien and accept in lieu thereof the personal liability of the new company, corporate creditors have no standing in court to object to the consolidation of the debtor company with other corporations.<sup>88</sup> It would seem, however, that when the consolidation evidently imperils the security of corporate creditors, and no provision is made for the payment of the debts of the original companies, the creditors may prevent the consolidation, at least until their rights have been secured.<sup>89</sup> As the new company succeeds to the rights as well as the debts of the old, it has power to compromise and settle claims against them.<sup>90</sup> The directors of the new company may discharge debts of the old, without special authorization of their shareholders.<sup>91</sup> The new company can not deny the validity of the bonds of the old company, put in circulation by the new.<sup>92</sup>

**§ 1289. Contract obligations of the companies.**—A person performing labor, under a contract with one of the old companies, may maintain an action against the new company to recover whatever sum was due him upon his contract.<sup>93</sup> But under a contract, made by a railroad company, to haul the cars of a car company over its road, a new company by the same name formed by consolida-

<sup>87</sup> New Jersey, etc. R. Co. v. Strait, 35 N. J. L. 323.

<sup>92</sup> Eaton, etc. R. Co. v. Hunt, 20 Ind. 457.

<sup>88</sup> Powell v. North Missouri, etc. R. Co., 42 Mo. 63; *In re Manchester, etc. Assn.*, L. R. 9 Eq. 643; *In re India, etc. Assurance Co.*, L. R. 7 Ch. 651; Griffith's Case, L. R. 6 Ch. 374; *In re Family Endowment Soc.*, L. R. 5 Ch. 118.

<sup>93</sup> Western U. R. Co. v. Smith, 75 Ill. 496; Philadelphia, etc. v. Howard, 13 How. 307.

<sup>89</sup> Booth v. Bruce, 33 N. Y. 139, 38 Am. Dec. 372; Barclay v. Quicksilver Mining Co., 9 Abb. Pr. N. S. 283. Cf. Kelley v. Mariposa, etc. Co., 4 Hun, 632.

Especially where the articles of consolidation of two railway companies provided that the new company should assume the debts and liabilities of the old companies, and should assume and carry out all their unexecuted contracts, and the act of the legislature, ratifying and confirming the consolidation, saved the rights and remedies of creditors.

<sup>90</sup> Paine v. Lake Erie, etc. R. Co., 31 Ind. 283.

<sup>91</sup> Shaw v. Norfolk County R. Co., 15 Gray, 407.

tion with other companies, is not bound to haul such cars except over the road of the old company, and is not bound to do so over the new lines.<sup>94</sup> And a railroad whose stock is mostly owned by another company, but whose existence is still preserved and which is operated by its own board of directors, is in no legal sense controlled by the company owning its stock, so as to make an agreement by the latter company to haul cars over its road apply to hauling them over the subordinate road.<sup>95</sup> So, too, a provision in a contract of purchase of the property and franchises of one company by another, that all existing contracts for certain privileges "shall be respected and maintained at rates not exceeding the present rates," was held not to be perpetual as to those contracts, but merely as binding the purchaser to respect them during what remained of their unexpired term.<sup>96</sup> The obligation, however, of one of the original companies to restore a stream, the usefulness of which had been impaired by its works, devolves upon the consolidated company.<sup>97</sup>

**§ 1290. Mortgage debts and liens.**—The consolidated corporation takes the property of the constituent corporations, subject to all mortgage liens,<sup>98</sup> whether recorded or not prior to consolidation, because it is charged with knowledge of them.<sup>99</sup> Unsecured creditors, of the consolidating corporations, have no specific lien upon their property in the hands of the new corporation,<sup>1</sup> unless by statute or by the terms of the agreement to consolidate.<sup>2</sup> A mortgage, executed by the new corporation upon its property in all the States, is regarded as made by the corporation of each State,<sup>3</sup> and the courts of any one of the States may foreclose the property in all the States.<sup>4</sup> Liens, created by the constituent companies, are superior to those of the same class created by the consolidated

<sup>94</sup> *Pullman Car Co. v. Missouri Pac. Ry. Co.* (1885), 115 U. S. 595, affirming 11 Fed. Rep. 634.

<sup>95</sup> *Pullman Car Co. v. Missouri Pac. Ry. Co.* (1885), 115 U. S. 595, affirming 11 Fed. Rep. 634.

<sup>96</sup> *Hurt v. Terrill* (1887), 83 Va. 167.

<sup>97</sup> *Chicago, etc. R. Co. v. Moffitt*, 75 Ill. 524.

<sup>98</sup> *The Key City*, 14 Wall. (U. S.) 654; *Central R. & B. Co. v. Georgia*, 92 U. S. 665; *Eaton, etc. R. Co. v. Hunt*, 20 Ind. 457; *Rutten v. Union Pacific R. Co.*, 17 Fed. 480.

<sup>99</sup> *Mississippi Valley, etc. v. Chicago, etc. Co.*, 58 Miss. 846, 38 Am. St. Rep. 348; *Schutte v. Florida R. Co.*, 3 Woods, 692, Fed. Cas. No. 17,434.

<sup>1</sup> *Wabash, etc. R. Co. v. Ham*, 114 U. S. 587.

<sup>2</sup> *Compton v. Wabash, etc. Co.*, 45 Ohio St. 592, 16 N. E. 110.

<sup>3</sup> *Racine, etc. Co. v. Farmers' Loan, etc. Co.*, 49 Ill. 331, 95 Am. Dec. 595.

<sup>4</sup> *Mead v. New York, etc. Co.*, 45 Conn. 199.

corporation.<sup>5</sup> Express liens, however, merely follow the property coming into the hands of the consolidated company;<sup>6</sup> and all subsisting liens on the acquired property remain unimpaired.<sup>7</sup> The consolidated company is not a purchaser without notice, with respect to the property derived from the original companies.<sup>8</sup> But while the consolidated company receives the assets of the old with notice, and therefore takes them *cum onere*, yet a purchaser from it may occupy, in respect of them, the status of a *bona fide* purchaser without notice, so as to hold them free from liability for the debts of the original company.<sup>9</sup> Though, of course, where one company purchases the assets of another for value in good faith, it does not take them in trust to pay the debts of the other.<sup>10</sup> A consolidated company can not plead ignorance of liens upon property it acquires by consolidation, although dormant and unrecorded.<sup>11</sup> So, too, a consolidated corporation is chargeable with notice of a contract for the sale of land, made by one of the companies forming the consolidation and entered upon its corporate books, and does not occupy the position of an innocent purchaser, in good faith and without notice.<sup>12</sup> A corollary of the rule of fastening the debts of the old companies upon the new, is that where the indebtedness of an old company has not ripened into a lien, the effect of consolidation with another is to release the former of all indebtedness, where the latter becomes the proprietor of the property and franchises of the former.<sup>13</sup>

<sup>5</sup> *Shackleford v. Mississippi Central R. Co.*, 52 Miss. 159; *Ritter v. Union Pacific R. Co.* (U. S. C. C., S. D. of N. Y. 1883), 12 Am. & Eng. R. Cas. 374; *Hazard v. Vermont*, etc. R. Co., 17 Fed. Rep. 753.

<sup>6</sup> *Powell v. North Missouri R. Co.*, 42 Mo. 63. Thus, of course, a mortgage lien may be enforced against property covered by it, after the consolidation. *Eaton, etc. R. Co. v. Hunt*, 20 Ind. 457; *Racine, etc. R. Co. v. Farmers' Loan & Trust Co.*, 49 Ill. 331, 95 Am. Dec. 595. Likewise, a maritime lien on a vessel remains after the consolidation of the corporation owning the vessel. *The Key City*, 14 Wall. 653.

<sup>7</sup> *Rutten v. Union Pacific Ry. Co.*, 17 Fed. Rep. 480; *The Key City*, 14 Wall. 653; *North Carolina R. Co. v. Drew*, 3 Woods, 691;

*Mississippi Valley Co. v. Chicago, etc. R. Co.*, 58 Miss. 896, 38 Am. Rep. 348.

<sup>8</sup> *The Key City*, 14 Wall. 653; *North Carolina R. Co. v. Drew*, 3 Woods, 691; *Mississippi Valley R. Co. v. Chicago, etc. R. Co.*, 58 Miss. 896, 38 Am. Rep. 348. Cf. *Whipple v. Union Pacific Ry. Co.*, 28 Kan. 474.

<sup>9</sup> *McMahon v. Morrison*, 16 Ind. 172.

<sup>10</sup> *Powell v. North Missouri R. Co.*, 42 Mo. 63.

<sup>11</sup> *The Key City*, 14 Wall. 653; *Mississippi Valley Co. v. Chicago, etc. R. Co.*, 58 Miss. 896, 38 Am. Rep. 348; *McAlpine v. Union Pacific Ry. Co.*, 23 Fed. Rep. 168.

<sup>12</sup> *McAlpine v. Union Pacific Ry. Co.*, 23 Fed. Rep. 168.

<sup>13</sup> *Bruffett v. Great W. R. Co.*, 25 Ill. 353.

**§ 1291. Judgment against the new company. Exemption from taxation of the old companies.**—But, although actions against the old companies may be prosecuted to judgment against the new company without new process,<sup>14</sup> still to obtain a judgment against the consolidated company itself, it must be substituted as defendant.<sup>15</sup> Judgment against the consolidated company on claims against one of the original corporations, may be enforced by levy of execution upon the property of the latter, notwithstanding its dissolution.<sup>16</sup> And the fact that the particular separate division, on which a mortgage rests, is sold at the same time and together with other consolidated divisions of the road, is in no manner a violation of the contract of the mortgagee. For where there is a concourse of creditors of the original companies, they are not to be required to levy execution, each against those portions only of the property originally belonging to the companies respectively indebted to them; but that they may sell the whole consolidated property, and apportion the proceeds among themselves, because, if cut up into parcels and sold by divisions, it would lose its great value as a continuous line of road.<sup>17</sup> If there has been an attempted, though void consolidation, which has been judicially dissolved, but, while it remained *de facto*, a judgment has been recovered against the consolidated company, it will be allowed to stand after the dissolution as a judgment against the several constituent companies.<sup>18</sup>

*Exemption from taxation does not survive when.*—If at the time of consolidation, there is a constitutional prohibition against exemptions from taxation, the new corporation can not acquire exemption, though it had been granted to the component corporations, prior to the consolidation.<sup>19</sup>

<sup>14</sup> Indianapolis, etc. R. Co. v. Jones, 29 Ind. 465; Kinion v. Kansas City, etc. R. Co., St. Louis Ct. of App. No. 4440, cited by S. D. Thompson, judge of that court, in 31 Cent. L. J. 4. But the Supreme Court of Georgia has held that new process is necessary to bring in the consolidated company. Selma, etc. R. Co. v. Harbin, 40 Ga. 706.

<sup>15</sup> Prouty v. Lake Shore, etc. Ry.

Co., 52 N. Y. 363; Selma, etc. R. Co. v. Harbin, 40 Ga. 706. Cf. Ketcham v. Madison, etc. R. Co., 20 Ind. 260.

<sup>16</sup> Ketcham v. Madison, etc. R. Co., 20 Ind. 260.

<sup>17</sup> Gilbert v. Washington City, etc. R. Co., 33 Gratt. 586, 611.

<sup>18</sup> Ketcham v. Madison, etc. Co., 20 Ind. 280.

<sup>19</sup> Chesapeake, etc. Ry. Co. v. Miller, 114 U. S. 176.

## CHAPTER LIV.

### FORFEITURE OF CHARTER.

§ 1292. Forfeiture distinguished from repeal. Reserved right to repeal.	its right to forfeit the charter.
1293. Judicial and legislative inquiry distinguished.	§ 1300. Right of the state to proceed in what cases of <i>ultra vires</i> acts.
1294. Grounds for forfeiture. Misuser and abuse of corporate franchise as ground.	1301. Procedure to forfeit. Jurisdiction and powers of the courts.
1295. Injunction proceedings in equity.	1302. Actual or prospective injury to the public to be proven.
1296. Sale or lease of the entire corporate property as ground.	1303. <i>Quo warranto</i> proceedings to test <i>de jure</i> existence of the corporation.
1297. Only the state can bring suit to forfeit the charter.	1304. <i>Quo warranto</i> procedure to forfeit the charter.
1298. The act of forfeiture not to be collaterally tried.	1305. <i>Scire facias</i> proceedings in case of abuse of corporate powers.
1299. Waiver by the state of	

#### References:

Forfeiture of charter by repeal. Sections 80-95, 1309.  
Police power of the state; legislative control. Sections 922-932.  
Liability for fraudulent issue of stock. Sections 275-298.  
Trusts and monopolies. Sections 933-948.  
Sale or lease of all the property and franchises. Sections 830-835.  
Insolvency of the corporation. Sections 1317, 1205.  
State alone may institute proceedings. Section 1001.  
Sequestration of corporate property. Sections 1012, 1025, 1312.  
Grounds for dissolution. Sections 232, 683, 1306-1328.

§ 1292. Forfeiture distinguished from repeal. Reserved right to repeal.—Where the legislature in granting a charter reserves the right to repeal it for cause, this is a different matter from declaring a forfeiture; and although it depends upon matters of fact, it is not necessary for the legislature to wait until those facts have been judicially ascertained.<sup>1</sup> The legislature exercises

<sup>1</sup> *Vide supra*, §§ 80-95, and *infra*, 1309, FORFEITURE BY REPEAL; Erie & N. E. R. Co. v. Casey, 26 Pa. St. 287, 302, where the charter under consideration contained a clause

providing that "If the said company abuse or misuse any of the privileges hereby granted, the legislature may resume the rights granted to the said company."

its power to repeal in accordance with the conditions of the contract, namely, of the reservation in the grant of the charter, whether it be by special act or under general law; while a court, independently of any reserved right, declares a forfeiture for abuse of corporate franchises or powers. When the charter contains reserved right to repeal, it is as much a part of the contract as anything else that is in it. The legislative repeal of such a charter bears no resemblance to the judgment of a court against the corporation on a *quo warranto*. They proceed upon principles as different as the functions of the legislature are different from those of the judiciary. If the power to repeal be reserved, its exercise is merely carrying out the contract according to its terms; and the State is using its own rights—not forfeiting those of the company.<sup>2</sup> It is conceded that without any reservation of the right to repeal, the judiciary would have power to annul and make void the charter, upon ascertaining, by a proper issue, such misuse and abuse. If, therefore, it were first necessary to form an issue in the courts, and judicially investigate such facts, it would seem absurd in the legislature to have reserved the right thereafter to repeal, when the same end could be accomplished, as substantially and more speedily, by the court which tried the issue. "Such reasoning must lead to the inference that the clause providing for a repeal means nothing."<sup>3</sup> "There is no rule of law which prohibits the repeal of a special charter by general law, nor is there any principle of law forbidding such repeal, without the use of ex-

<sup>2</sup> Erie & N. E. R. Co. v. Casey, 26 Pa. St. 287, 301.

<sup>3</sup> Miners' Bank v. United States (1848), 1 Greene (Iowa), 553, 562, where the reservation was: "That if the said corporation shall fail to go into operation, or shall abuse or misuse their privileges under this charter, it shall be in the power of the Legislative Assembly of the territory to annul, vacate, and make void this charter." In Erie & N. E. R. Co. v. Casey, 26 Pa. St. 287, 302, the court said: "The plaintiff's counsel insist that inasmuch as the right of repeal depended on matter of fact, the right could not be exercised until the fact was ascertained by a judicial trial. But

if this were not a mistake the reservation would be nugatory. When the abuse of a charter is judicially ascertained, the corporation will be dissolved without the intervention of the legislature, and the court could not decide the fact to be true without pronouncing the judgment of forfeiture. The legislature certainly meant to reserve something more than the right to dissolve the corporation, after it shall be dissolved by a court. The power to kill what is already dead is no power at all. The argument of the plaintiff on this point is altogether unsustained by authority. There are several cases directly against it."

press words declarative of the legislative intent to repeal the earlier statute. Repeals by implication are not favored. But the question is always one of legislative intent, and the intent to abrogate the particular enactment in an earlier statute by general enactment in a later statute, is sufficiently manifested where the provisions of the two enactments are so inconsistent that they can not stand together."<sup>4</sup> But a statute will not be construed to repeal the charter, if it will reasonably admit of any other construction.<sup>5</sup> Nor unless such appears to be the legislative intent, either expressed in the words of the statute, or necessarily implied.<sup>6</sup>

§ 1293. Judicial and legislative inquiry distinguished.—A difficulty, however, arises from the principle that the power of repeal reserved in charters can not be capriciously exercised,<sup>7</sup> and legislatures having seldom, if ever, exercised even the broadest reservation of the power of repeal, until after careful examination into any alleged breach of the conditions upon which a charter may have been granted, these investigations have been mistakenly supposed to be judicial in their nature.<sup>8</sup> If the reservation is of the right to repeal if certain conditions are not complied with, its

<sup>4</sup> Morris, etc. Ry. v. Comm'rs, etc., 37 N. J. Law, 228.

<sup>5</sup> Mechanics', etc. Bank v. Bridges, 30 N. J. Law, 112; Donworth v. Coolbaugh, 5 Iowa, 300; Mutual, etc. Assn. v. Brown, 29 N. J. Eq. 121; Cooper v. Arctic Ditchers, 36 Ind. 233.

<sup>6</sup> Miners' Bank v. U. S., Greene (Iowa), 553, 43 Am. Dec. 115; Farnsworth v. Minn. Ry. Co., 92 U. S. 49; State v. Noyes, 47 Me. 189; Erie, etc. Ry. Co. v. Casey, 26 Pa. St. 287; Commonwealth v. Pittsburgh, etc. R. R., 58 Pa. St. 26.

<sup>7</sup> *Vide supra*, § 89; Shields v. Ohio (1877), 95 U. S. 375; Sinking Fund Cases (1878), 99 U. S. 700.

<sup>8</sup> In an early case in Massachusetts this error was exposed. "We do not believe," said the court, "that the inquiry into the affairs or defaults of a corporation, with a view to continue or discontinue it, is a *judicial act*. No issue is formed. No decree or judgment is passed. No forfeiture is adjudged. No fine or punish-

ment is imposed. But an inquiry is had in such form as is deemed most wise and expedient, with a view to ascertain facts upon which to exert legislative power, or to learn whether a contingency has happened upon which legislative action is required. . . . This is the constant and necessary course of proceeding, not only in relation to private and special acts, but also to many public acts. In granting new charters, or enlarging, modifying or renewing old ones, and in a large portion of ordinary legislation, it is the duty of the legislature to inquire and ascertain whether existing facts render this action expedient or necessary. These proceedings, though they bear some resemblance to, and have in view the same general object, the ascertainment of truth, yet in no proper sense can they be called *judicial acts*." Crease v. Babcock (1839), 23 Pick. 334, 344.

acts are subject to review by the courts.<sup>9</sup> And it is urged that the investigation and determination of the question whether the occasion has arrived upon which the reserved power of the legislature may be exercised, is one of judicial and not of legislative cognizance; and that any attempted action by the legislature prior to such judicial determination, would be in excess of its powers, and an encroachment upon the authority of the judiciary.<sup>10</sup> The cases, however, which sustain this objection fail to draw any clear distinction between forfeiture and repeal, often using the words interchangeably, in such a manner as to beget confusion. The rules deducible from the more accurately worded opinions would seem to be, first, that in the absence of any express reservation to the legislature, the State may exercise its visitorial power over corporations only through its judicial department;<sup>11</sup> second, that an unconditional reservation of the power to revoke the franchises or repeal the charter of corporations, vests in the legislature a discretion which can be questioned by the courts, only when it has been wantonly abused;<sup>12</sup> and, third, that when the reservation of the power of revocation and repeal has not been unconditionally

<sup>9</sup> Miners' Bank v. United States, 1 Greene (Ia.), 553, 43 Am. Dec. 115; Erie, etc. Ry. Co. v. Casey, 26 Pa. St. 287.

<sup>10</sup> Flint, etc. Plank Road Co. v. Woodhull, 25 Mich. 99, 112; State v. Noyes, 47 Me. 189; Chesapeake & O. Canal Co. v. Baltimore & O. R. Co., 4 Gill & J. 123; Regents of the University of Maryland v. Williams, 9 Gill & J. 365. Thus in Flint, etc. Plank Road Co. v. Woodhull, 25 Mich. 99, 112, where the charter of the corporation contained a reservation that no repeal should be made unless "it be made to appear to the legislature that there has been a violation by the company of some of the provisions of this act," the court said: "We are constrained, therefore, from all these considerations, to say, that the determination whether a corporation has violated its charter is judicial in its nature. It requires the action of those tribunals which must hear before they condemn, and must proceed upon inquiry. If it

were properly legislative, it may be that the legislature must be presumed to have given a hearing; but the fact, as we have seen in this case, is otherwise, and the cases in which presumptions are to be indulged against the facts ought not to be multiplied. It is sufficient to say, that, in our opinion, the case is one in which the party is entitled to a trial of right *in fact*, and cannot be put off with one which rests exclusively in a presumption of law, indulged against the fact. The violation of the charter cannot be legally made to appear, except on trial in a tribunal whose course of proceeding is devised for the determination of questions of this nature."

<sup>11</sup> *Vide* case cited *supra*, § 1292. See Beach on Railways, § 592.

<sup>12</sup> *Vide supra*, §§ 86, 89. Spring Valley Water Works v. Schottler, 110 U. S. 347; Sinking Fund Cases (1878), 99 U. S. 700, 720; Shields v. Ohio (1877), 95 U. S. 375.

reserved, but its exercise by the legislature has been made to depend upon some breach by the corporation of the conditions upon which its charter and franchises were granted,—the legislature alone can determine for itself whether the circumstances are such as to warrant it in the exercise of the power;<sup>13</sup> but that, as in other

<sup>13</sup> *Myrick v. Brawley* (1886), 33 Minn. 377; *Kennedy v. Strong*, 14 Johns. 129; *De Camp v. Eveland*, 19 Barb. 81; *Lothrop v. Stedman*, 42 Conn. 584, 13 Blatchf. 134; *New York, etc. R. Co. v. Boston, etc. R. Co.*, 36 Conn. 196; *Crease v. Babcock*, 23 Pick. 334, 345, where the court declared that "it is indispensable that this inquiry should, in the first instance, be made by the legislature. No other body can do it for them. They have restricted themselves from exercising the power of repeal, until a certain event happens. This they must necessarily ascertain before they can properly exercise the power. Their decision must, *prima facie*, be presumed to be right. Whether it be conclusive or not, is a question which it is not necessary now to determine." So also in another well-considered case, under a grant of a franchise together with a reservation that on failure of the grantee to fulfill any of the conditions of the act, the legislature "may at any time alter, amend, or repeal the same;" it was held that the legislature might repeal the act without any previous judicial determination that the grantee had so failed. *Miners' Bank v. United States*, Morris, 482, 43 Am. Dec. 115; *Miners' Bank v. United States*, 1 Greene (Iowa), 553; *Carey v. Gfles*, 9 Ga. 253; *Oakland R. Co. v. Oakland, etc. R. Co.*, 45 Cal. 365; *Myrick v. Brawley* (1886), 33 Minn. 377. In this case the court said: "Where the right reserved to recall the grant depends on the happening of a contingent event, the existence of the fact at the

time of the recall must, of course, be a matter for judicial investigation. Whether the re-entry by a private grantor perfects a forfeiture must depend on the fact of condition broken, and that must be ascertained by the judiciary; but in no case where the forfeiture may be enforced by act of the grantor, need he secure, before he enforces it, a judicial determination that the fact upon which the right to forfeit depends, exists. The courts will decide upon the effects of his acts subsequently. But neither does the legislature, when it exercises a reserved right to repeal, nor the private grantor, when he exercises a reserved right of re-entry, perform any judicial function. The act of neither assumes to determine finally the rights of the parties as affected by the act to enforce the forfeiture. That is necessarily and inherently a judicial question, which only the judiciary can decide." *Myrick v. Brawley* (1886), 33 Minn. 377, 379; *Erie & N. E. R. Co. v. Casey*, 26 Pa. St. 287, 302. In *Crease v. Babcock*, 23 Pick. 234, the Supreme Court of Massachusetts said that when the legislature reserved to itself the right to repeal a charter on the happening of a certain event, they might enact the repeal whenever the event happened; it was not a reservation of judicial power. To the same effect is *McLarren v. Pennington*, 1 Paige, 107; and in the *Miners' Bank of the United States*, 1 Greene (Iowa), 561, it was held, not only that the fact, on which the right of repeal depended, might be noticed by the legislature without the assistance

cases, its action in the matter is subject to subsequent review by the courts, and upon a judicial determination that the contingency had not arisen upon which the reserved power was made to depend, the repealing act may be declared null and void.<sup>14</sup>

**§ 1294. Grounds for forfeiture. Misuser and abuse of corporate franchise as ground. Examples.**—The remedies for misuser of corporate franchises, and *ultra vires* acts in usurpation of corporate powers, either unauthorized, or prohibited, are:—  
(a) Repeal of the charter; (b) proceedings at law by *quo warranto* to forfeit the charter; (c) proceedings to oust the corporation from exercise of usurped powers; (d) proceedings in equity for an injunction to restrain *ultra vires* acts. “Unless there is a clear, wilful misuse, abuse, or non-use of the franchises sought to be forfeited, or violation of law,—something that strikes at the very groundwork of the contract between the corporation and the sovereign power; something that amounts to a plain wilful abuse of power or violation of law, within the meaning of the statute on the subject, whereby the corporation fails to fulfill the very design and purpose of its organization,—leave will not be granted by the court to resort to the extraordinary remedy for a forfeiture of its franchises.”<sup>15</sup>

*Examples:*—It is misuser of the powers of a corporation, chartered to manufacture railway cars, to lay out a town around its works, and to construct and lease to its employes thousands of homes. To proceedings to forfeit its charter, it is no defense that its property has been taxed by the State.<sup>16</sup> As a case of abuse and misuser of franchises, *quo warranto* proceeding to forfeit the charter will lie against a corporation organized to purchase the property of other corporations, engaged in like business.<sup>17</sup> Further examples are: Purchase of majority of its stock by another cor-

of the judiciary, but that its truth could never afterwards be questioned by any court.” The latter case, however, so far as respects the finality of the legislative determination, may be regarded as of doubtful authority.

<sup>14</sup> “The most that can be said is, that the repeal is void if it comes before the court. If the corporators desire to contest the validity of the repealing act in a court, they must at least prove that the

event did not occur.” *Erie & N. E. R. Co. v. Casey*, 26 Pa. St. 287, 302.

<sup>15</sup> *Vide infra*, § 1306, GROUNDS FOR DISSOLUTION. *State v. Janesville Water Co.* (1896), 92 Wis. 496, 32 L. R. A. 391.

<sup>16</sup> *People v. Pullman P. C. Co.* (1898), 175 Ill. 125.

<sup>17</sup> *Distilling, etc. Co. v. People* (1895), 156 Ill. 448, 47 Am. St. Rep. 200.

poration, and execution of illegal mortgage upon the property;<sup>18</sup> the sale of medical diplomas as the chief business of a medical college;<sup>19</sup> engaging in the lottery business;<sup>20</sup> management of a railroad corporation by directors elected by stockholders of a foreign corporation;<sup>21</sup> failure of a plank-road company to keep its road in repair;<sup>22</sup> failure of a waterworks company to supply pure water;<sup>23</sup> proof that a stock exchange is a gambling institution,<sup>24</sup> and the levy of illegal assessments upon its stockholders;<sup>25</sup> failure of street railway company to pave the street between its tracks, and to make them conform to the street grade;<sup>26</sup> making unauthorized lease of its line by a railroad corporation;<sup>27</sup> entering into a trust with stockholders of competing corporations, to monopolize and raise the price of sugar;<sup>28</sup> issuing stock for a mine, and its inspection upon an option to buy, without evidence of ownership by the person giving the option;<sup>29</sup> issuing a million of dollars of stock upon the possibility of the grant of a patent applied for;<sup>30</sup> failure to hold annual election of directors, and failure of directors to own qualification shares;<sup>31</sup> failure to file required annual reports, and failure of stockholders to make required payment of capital stock;<sup>32</sup> agreement between two competing gas companies to charge and maintain a certain rate, and not to compete against each other.<sup>33</sup> As further examples of mis-user and abuse of corporate franchises, as ground for forfeiture, are the following: It was held to be abuse and mis-user of its

<sup>18</sup> Commonwealth v. Punxsutawney, etc. Co. (Pa. 1901), 47 Atl. 843.

<sup>19</sup> Independent, etc. College v. People (1899), 182 Ill. 274; Illinois, etc. University v. People (1897), 166 Ill. 171.

<sup>20</sup> State v. Nebraska, etc. Co., 92 N. W. 763 (Neb. 1902).

<sup>21</sup> State v. Port Royal, etc. Ry. (1895), 45 S. C. 470, 23 S. E. 383.

<sup>22</sup> Davis v. Vernon, etc. Co., 103 Ga. 491 (1893), 29 S. E. 475; People v. Plainfield, etc. Co. (1895), 105 Mich. 9.

<sup>23</sup> State v. Capital, etc. Co., 102 Ala. 231 (1894), 105 Ala. 406, 14 So. 652.

<sup>24</sup> People v. San Francisco, etc. Exchange (Cal. 1893), 33 Pac. 785.

<sup>25</sup> People v. Rosenstein, etc. Co. (1900), 131 Cal. 153.

<sup>26</sup> State v. Omaha, etc. Co., 91 Iowa, 517 (1894).

<sup>27</sup> Eel River R. R. v. State, 155 Ind. 433 (1900).

<sup>28</sup> People v. North River Sugar Ref. Co. (1890), 121 N. Y. 582.

<sup>29</sup> State v. Hogan (1901), 163 Mo. 43, 9 L. R. A. 33, 18 Am. St. Rep. 843.

<sup>30</sup> State v. Webb (1893), 97 Ala. 111, 12 So. 377, 38 Am. St. Rep. 151.

<sup>31</sup> Lorillard v. Clyde (1894), 142 N. Y. 456, 24 L. R. A. 113.

<sup>32</sup> People v. Buffalo, etc. Co., 131 N. Y. 140 (1892), 15 L. R. A. 240; State v. Brownstown, etc. Co., 120 Ind. 337 (1889).

<sup>33</sup> State v. Portland, etc. Co., 153 Ind. 483 (1899), 53 L. R. A. 413.

corporate powers for a railroad to condemn private property, and construct the line of road, different from that provided in its charter, and only for benefit of mines owned by its stockholders.<sup>34</sup> Where a corporation was organized under a statute, authorizing incorporation for "any lawful business," and its business was not by law declared unlawful, but was such as could inevitably injure and defraud the public, the charter may be annulled;<sup>35</sup> and the charter of a bank may be dissolved for such mismanagement of its affairs as threatens dangers of fraud and loss of the funds of stockholders or of others;<sup>36</sup> failure to maintain its office or principal place of business within the State, and failure to keep its books and records there;<sup>37</sup> failure of officers or directors to reside in the State, as required by statute.<sup>38</sup>

*Wilful acts and neglects of the corporation officers, when imputable as acts of the corporation.*—"In its relations to the government, and when the acts and neglects of a corporation, in violation of its charter or the general law, become the subject of public inquiry with a view to forfeiture of its charter, the wilful acts, neglects of its officers, are regarded as the acts and neglects of the corporation, and render it liable to a judgment or decree of dissolution.<sup>39</sup> But the charter will not be forfeited for the acts of subordinate officers or agents, not authorized or directed by the stockholders or directors."<sup>40</sup>

*Grounds held insufficient to authorize forfeiture for mis-user,* are: illegal assessment made upon the corporate stock;<sup>41</sup> *ultra vires* consolidation, in good faith, of corporations, where the consolidation was subsequently declared void;<sup>42</sup> trespass by turn-pike company in construction of its road over lands without authority

<sup>34</sup> *State v. Hazleton, etc. Co.*, 40 Ohio St. 504.

<sup>35</sup> *State v. Debenture, etc. Co.*, 51 La. Ann. 1874, 26 So. 600.

<sup>36</sup> *Bank Comm'r's v. Rhode Island Central Bank*, 5 R. I. 12.

<sup>37</sup> *Simmons v. Norfolk, etc. Co.* (1893), 113 N. C. 147, 22 L. R. A. 677, 37 Am. St. Rep. 614; *State v. Topeka Water Co.* (1898), 59 Kan. 151, 52 Pac. 422; *State v. Park, etc. Co.* (1894), 58 Minn. 330, 49 Am. St. Rep. 516; *State v. Milwaukee, etc. Co.* (1878), 45 Wis. 579.

<sup>38</sup> *State v. So. Pac. Ry. Co.*, 24

Tex. 80; *Huylar v. Cragin Cattle Co.*, 40 N. J. Eq. 392, 42 N. J. Eq. 139.

<sup>39</sup> *Bank Comm'r's v. Bank of Buffalo*, 6 Paige (N. Y.), 497; *Bank of Vincennes v. State*, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234.

<sup>40</sup> *Tuscaloosa, etc. Assn. v. State*, 58 Ala. 54.

<sup>41</sup> *People v. Rosenstein, etc. Co.*, 131 Cal. 153, 63 Pac. 163.

<sup>42</sup> *State v. Crawfordsville, etc. Co.*, 102 Ind. 283; *State v. Crawfordsville T. Co.*, 102 Ind. 600.

of law;<sup>43</sup> loan of money at usurious rates by money-loan corporation, unrestricted by its charter as to rate of interest.<sup>44</sup>

*Sufficient grounds* for procedure to forfeit the charter of a corporation for non-user of its franchises, are the following: Wilful failure by a water company for a long time to furnish a city and its inhabitants with water;<sup>45</sup> failure of a corporation to keep its principal place of business and its books and records and principal offices within the State.<sup>46</sup> Where the corporation required to maintain a ferry or a bridge, abandoned its ferry and failed to furnish a bridge;<sup>47</sup> where a railroad corporation abandoned a part of its line of road;<sup>48</sup> where a railroad allowed its road to be sold under execution;<sup>49</sup> where a freight and passenger railroad company refused, or failed, to furnish cars for passengers;<sup>50</sup> where a bridge company failed to rebuild within reasonable time its destroyed bridge, necessary for travel over a public road;<sup>51</sup> a sale or lease of its road by railroad or turn-pike company to another corporation and abandonment of operation of the road;<sup>52</sup> failure of a railroad company to construct a line of road such as its charter required;<sup>53</sup> failure for a long time of a turnpike company to construct or repair its road;<sup>54</sup> failure of a railroad or a turnpike company to make to the legislature required annual report, necessary for regulation of rates of fare or toll;<sup>55</sup> failure of a manufacturing company to make annual statements of amount paid on its capital stock;<sup>56</sup> failure of a bank corporation to make report of its condition, required for protection of the public;<sup>57</sup> failure of a corporation to make required annual reports to the legislature of

<sup>43</sup> State v. People, etc. Assn., 42 Ohio St. 579.

<sup>44</sup> State v. Urbana, etc. Co., 14 Ohio, 7.

<sup>45</sup> State v. Capital City W. Co., 102 Ala. 231, 14 So. 652.

<sup>46</sup> State v. Milwaukee, etc. Co., 45 Wis. 579.

<sup>47</sup> State v. Council Bluffs, etc. Co., 11 Neb. 354, 9 N. W. 563.

<sup>48</sup> People v. Albany, etc. R. Co., 24 N. Y. 261, 82 Am. Dec. 295.

<sup>49</sup> State v. Minn., etc. Co., 36 Minn. 246, 30 N. W. 816; State v. Rives, 5 Ired. L. (N. C.) 297.

<sup>50</sup> People v. Pittsburgh R. Co., 53 Cal. 694.

<sup>51</sup> Enfield Co. v. Conn. River Co., 7 Conn. 28; People v. Hillsdale,

etc. Co., 23 Wend. (N. Y.) 254, 2 Johns. 190.

<sup>52</sup> State v. Pawtucket T. Corp., 8 R. I. 182, 94 Am. Dec. 123.

<sup>53</sup> State v. Hazelton, etc. Co., 40 Ohio St. 504.

<sup>54</sup> People v. Plainfield, etc. Co., 105 Mich. 9; People v. Kingston, etc. Co., 23 Wend. (N. Y.) 193, 35 Am. Dec. 551; State v. Pawtucket, etc. Corp., 8 R. I. 182, 94 Am. Dec. 123.

<sup>55</sup> Commonwealth v. Tenth, etc. Corp., 11 Cush. (Mass.) 171; Att'y-Gen. v. Petersburg, etc. Co., 6 Ired. L. (N. C.) 456.

<sup>56</sup> People v. Buffalo, etc. Co., 131 N. Y. 140, 15 L. R. A. 240.

<sup>57</sup> State v. Seneca Co. Bank, 5 Ohio St. 171.

receipts and disbursements by the corporation;<sup>58</sup> transfer of its property and inactivity for nineteen years, of an educational corporation, notwithstanding pendency all that time, of a suit to recover part of the land which the company formerly owned;<sup>59</sup> suspension of specie payment by bank in violation of law;<sup>60</sup> but since United States treasury notes were made legal tender, payment therein is sufficient compliance with the law requiring payment in specie.<sup>61</sup> Alienation of all its property is ground for forfeiture, although its charter gave the corporation power to sell its land.<sup>62</sup> Defective organization is ground for forfeiture, as in case of non-compliance with conditions precedent.<sup>63</sup> By statute, in several States, abandonment or suspension of the corporate business for time specified, and regardless of the cause, is expressly made ground for forfeiture.<sup>64</sup> Inability to continue business and perform the charter conditions, is ground for forfeiture,<sup>65</sup> but not where such inability goes only to part of the corporate purposes, and the chief purpose is being accomplished.<sup>66</sup> Financial inability of the corporation to perform public duties, is no defense to proceedings for forfeiture for non-user.<sup>67</sup>

*For non-performance of conditions subsequent*, required by the charter, it may be forfeited.<sup>68</sup> For examples: Failure of a railroad or turnpike company to begin or to complete its road within the time limited in its charter;<sup>69</sup> failure of a bridge company to commence construction of its bridge within the time provided by the charter;<sup>70</sup> failure of subscription and payment of the re-

<sup>58</sup> Commonwealth v. Tenth, etc. Corp., 11 Cush. (Mass.) 171.

113 U. S. 574; State v. Real Estate Bank, 5 Ark. 595, 41 Am. Dec. 109.

<sup>59</sup> State v. Pipher, 28 Kan. 127.

<sup>66</sup> State v. Farmer's College, 32 Ohio St. 487.

<sup>60</sup> State v. Real Estate Bank, 5

<sup>67</sup> People v. Plainfield, etc. Co., 105 Mich. 9.

Ark. 595, 41 Am. Dec. 109; Commercial Bank v. State, 6 Sm. & M. (14 Miss.) 599, 45 Am. Dec. 280.

<sup>68</sup> Henderson Loan, etc. Assn. v. People, 163 Ill. 196; People v. Buffalo, etc. Co., 131 N. Y. 140, 15 L. R. A. 240; State v. Brownstown, etc. Co., 120 Ind. 337.

<sup>61</sup> State v. Tombeckbee Bank, 2 Stew. (Ala.) 30.

<sup>69</sup> Day v. Ogdensburg, etc. Co., 107 N. Y. 129; People v. Kingston, etc. Co., 23 Wend. (N. Y.) 193, 35 Am. Dec. 551; Hughes v. Northern Pac. Ry. Co., 18 Fed. 106, 9 Sawy. 313.

<sup>62</sup> State v. Seneca Co. Bank, 5 Ohio St. 171; State v. Pawtucket T. Corp., 8 R. I. 521, 94 Am. Dec. 123.

<sup>63</sup> Holman v. State, 105 Ind. 569.

<sup>64</sup> People v. Plainfield, etc. Co., 105 Mich. 9; State v. Atchison, etc. Co., 24 eb. 143, 8 Am. St. Rep.

164; People v. Albany, etc. Ry. Co., 24 N. Y. 261, 82 Am. Dec. 295.

<sup>65</sup> Ward v. Farwell, 97 Ill. 593; Chicago Life Ins. Co. v. Needles,

<sup>70</sup> *In re New York, etc. Bridge Co.*, 148 N. Y. 540, 1 Smith's Cas. 367.

quired amount of capital stock within the time limited.<sup>71</sup> Generally, substantial performance of conditions subsequent, attached to the grant of corporate franchises, must be complied with, whether or not the penalty of forfeiture for non-performance is expressly imposed in the charter;<sup>72</sup> but immaterial requirements will not be considered as intended to be such conditions.<sup>73</sup> It is no available defense, that the non-compliance with the conditions subsequent was not wilful, but resulted from mistaken construction of the requirement.<sup>74</sup>

*Among examples of grounds which have been held insufficient to authorize proceedings to forfeit a charter of a corporation for non-user of its franchises are: failure of a purely private corporation to organize under its charter;<sup>75</sup> non-exercise of all the company's corporate powers;<sup>76</sup> non-user of its franchises for a less period than that prescribed in a railroad charter, as ground for forfeiture in case of failure to operate its road;<sup>77</sup> because the corporate undertaking is impracticable or useless.<sup>78</sup> Merely technical non-compliance with a condition subsequent will not constitute ground for forfeiture. As, where the statute required the corporate books and papers to be kept at the company's principal place of business within the State and they were kept just across the State line from the company's office to which they were brought whenever they were properly required there for inspection by those entitled thereto.<sup>79</sup> But, in the case of a railroad, ferry, canal, or other *quasi* corporation charged with duties to the public, wilful abandonment or suspension of its business is generally sufficient ground for forfeiture,<sup>80</sup> except where the suspension is only temporary and works no injury to the public.<sup>81</sup> And in case of*

<sup>71</sup> People v. National Sav. Bank, 129 Ill. 618; People v. Buffalo, etc. Co., 131 N. Y. 140, 15 L. R. A. 240.

<sup>72</sup> State v. Nonconnah T. Co., 1 Tenn. 511, 17 S. W. 128.

<sup>73</sup> Harris v. Miss. Valley, etc. Co., 51 Miss. 602.

<sup>74</sup> State v. Nonconnah T. Co., 1 Tenn. 511, 17 S. W. 128.

<sup>75</sup> State v. Simonton, 78 N. C. 57.

<sup>76</sup> Wadesborough, etc. Co. v. Burns, 114 N. C. 353, 19 S. E. 238.

<sup>77</sup> People v. Atlantic, etc. R. Co., 125 N. Y. 513, 57 Hun, 378.

<sup>78</sup> People v. Recl. Dist., 53 Cal. 346.

<sup>79</sup> North & South, etc. Co. v. People, 147 Ill. 234; State v. Wood, 84 Mo. 378; People v. Kingston, etc. Co., 23 Wend. (N. Y.) 193, 35 Am. Dec. 551.

<sup>80</sup> State v. Atchison, etc. Co., 24 Neb. 143, 8 Am. St. Rep. 164; People v. Pittsburgh R. Co., 53 Cal. 694; People v. Albany, etc. Ry. Co., 24 N. Y. 261, 82 Am. Dec. 295; People v. Plainfield, etc. Co., 105 Mich. 9.

<sup>81</sup> State v. Commercial Bank, 13 Sm. & M. (21 Miss.) 569, 53 Am. Dec. 106; Commonwealth v. Fitchburg Co., 12 Gray (78 Mass.), 180.

purely private corporations, abandonment or long suspension of its business may furnish ground for forfeiture.<sup>82</sup>

*Misuser and non-user.*—An information to forfeit the charter of a corporation must set forth a substantial cause of forfeiture.<sup>83</sup> Wilful misuser, neglect or non-user of its franchises by a corporation, or failure to discharge the obligations imposed upon it, either expressly or by implication in its charter, constitutes a ground for the forfeiture thereof.<sup>84</sup> Generally, the charter will be subject to

<sup>82</sup> Henderson, etc. Assn. v. People, 163 Ill. 196; State v. Cannon, etc. Assn., 67 Minn. 14, 8 Am. St. Rep. 179; State v. Pipher, 28 Kan. 127.

<sup>83</sup> Attorney-General v. Railroad, 6 Ired. 456. See generally upon the grounds of forfeiture, Beach on Railways, §§ 585-588. Although it is said that an information in the nature of *quo warranto* against a corporation for forfeiture of its franchises may charge it generally with usurpation, and on defendant setting forth the act of incorporation and justifying under it, the attorney-general may reply the cause of forfeiture generally. People v. Kankakee River Improvement Co., 103 Ill. 491. In California it has been held that in a proceeding to forfeit the franchise of a corporation, and restrain its members from exercising the same, an allegation that defendants never had such franchise is sufficient, without specifying in what respects their right thereto is defective. People v. Stanford (1888), 77 Cal. 360. But where a count in a petition prays for the forfeiture of franchises then being exercised by a company of persons acting as a corporation, and alleges that if it ever had, as a corporation, any legal existence, privilege, or franchise, the same has become forfeited, the previous existence of the corporation not being alleged, no cause of action is stated. People v. Stanford (1888), 77 Cal. 360. A judgment forfeiting the charter

of a private corporation, and dissolving an injunction upon the acts of the liquidators that had been appointed by the company, will not be disturbed on appeal, unless the creditors or stockholders complain of the acts. State v. Herdic Coach Co., 35 La. Ann. 245.

<sup>84</sup> People v. North River Sugar Refining Co. (1890), 121 N. Y. 582, 8 Ry. & Corp. L. J. 22; State v. Bank of South Carolina, 1 Spears, 433; Valley Bank v. Ladies' C. S. Soc., 28 Kan. 423; State v. Pipher, 28 Kan. 127; State v. Commercial Bank, 10 Ohio St. 539; Planters' Bank of Mississippi v. State, 7 Sm. & M. 163; Beach on Railways, § 587. "Under our system of creating corporations by special acts of legislation, ostensibly for the public benefit, the judgment of the legislature is exercised upon the necessity and propriety of the corporate grant at the time and place where it is sought, and one important element in such judgment is the extent of previous outstanding corporate franchises of the same class and character. It is obvious that no accurate knowledge on this subject would be attainable, and no judicious legislation could be expected, if corporations created by existing and former acts were at liberty to cease transacting business and again resume it whenever they pleased. From the considerations, and the public objects and purposes of their creation, it follows that the charters of these corporations imply and

forfeiture in case of misuser or wilful abuse of the corporate franchise to the injury of the State, or of the people; whether such abuse is violative of any corporate powers conferred or not conferred, or of any charter or statutory prohibition, and when the misuser is contrary to principles of public policy.<sup>85</sup> And this penalty of the forfeiture in any such case of misuser "is the common law of the land, and is the tacit condition annexed to the creation of every such corporation."<sup>86</sup> For example, the failure of a bank to redeem its notes,<sup>87</sup> suspension of business by a corporation, or inability to perform its duties to the public by reason of insolvency.<sup>88</sup> In some States, insolvency is made by statute, a

require that they shall perform the business for which they are instituted, and an entire omission to commence business and a substantial suspension of the same after it is commenced, are alike violations of the provisions of their acts of incorporation." *In re Jackson Marine Ins. Co.*, 4 Sandf. Ch. 559. See, however, *Brandon Iron Co. v. Gleason*, 24 Vt. 228. The information must aver that the alleged nonfeasance or misfeasance was wilful on the part of the corporation. *State v. Turnpike Co.*, 2 Sneed, 254. See note by H. C. Black, to *Ottaquechee Woolen Co. v. Newton* (Vt. 1885), 21 Cent. L. J. 432, 434.

<sup>85</sup> *Ward v. Farwell*, 97 Ill. 593; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319, 8 L. R. A. 497; *Distilling, etc. Co. v. People*, 156 Ill. 448, 47 Am. St. Rep. 200; *Illinois, etc. Univ. v. People*, 166 Ill. 171; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; *People v. North River, etc. Co.*, 121 N. Y. 582, 18 Am. St. Rep. 843, *Darnell v. State*, 48 Ark. 321, 3 S. W. 365, 9 L. R. A. 33; *Bank of Vincennes v. State*, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234; *Lumbard v. Stearns*, 4 *Cush.* (58 Mass.) 60; *State v. Equitable, etc. Assn.*, 142 Mo. 325; *State v. Standard Oil Co.*, 49 Ohio St. 147, 15 L. R. A. 145, 34 Am. St. Rep. 541; *Trus-*

*tees, etc. v. Zanesville, etc. Co.*, 9 Ohio, 203, 34 Am. Dec. 436; *Commonwealth v. Commercial Bank*, 28 Pa. St. 383; *State v. Milwaukee, etc. Co.*, 45 Wis. 579; *State v. So. Pac. Ry. Co.*, 24 Tex. 80.

<sup>86</sup> *Terrett v. Taylor*, 9 Cranch. (U. S.), 4351; *King v. Avery*, 2 Term. R. 515; *State v. Portland, etc. Oil Co.*, 153 Ind. 483, 53 L. R. A. 413, 74 Am. St. Rep. 314; *New York, etc. Bridge Co. v. Smith*, 148 N. Y. 540; *Henderson, etc. Assn. v. People*, 163 Ill. 196; *State v. Canon, etc. Assn.*, 67 Minn. 14, 8 Am. St. Rep. 179, note, with numerous cases on forfeiture of corporate charters.

<sup>87</sup> *State v. Bank of South Carolina*, 1 Spears, 433; *Planters' Bank of Mississippi v. State*, 7 Sm. & M. 163; *State v. Commercial Bank*, 10 Ohio, 539.

<sup>88</sup> *Moseby v. Burrow*, 52 Tex. 396; *Shenandoah Valley Ry. Co. v. Griffith*, 76 Va. 913; *Hartford v. Boston, H. & E. R. Co.*, 40 Conn. 524, where it was held to be no defense that the suspension of business was involuntary and forced upon the company by legal proceedings. *People v. Northern R. Co.*, 53 Barb. 98, a case of insolvency together with suspension of business for thirteen years. But insolvency is not a ground of forfeiture except so far as it results in non-user. *State v. Commercial Bank*, 13 Sm. & M. 569. And the

ground of forfeiture or dissolution;<sup>89</sup> but in the absence of such statutory provision, mere insolvency does not authorize a forfeiture, unless it is so complete as to make it impossible for the corporation to perform the charter conditions.<sup>90</sup> But insolvency of the corporation is a valid ground for forfeiture of its charter, where the company is unable to continue its business without injury to its creditors and stockholders.<sup>91</sup> The neglect or refusal of a water company to supply water to all persons entitled thereto;<sup>92</sup> the failure of a railway company to run regular trains upon its road sufficient for the accommodation of the public;<sup>93</sup> the neglect of a turnpike company to rebuild bridges which have been destroyed,<sup>94</sup> or for placing its toll-gate in an unauthorized place,<sup>95</sup> or for making unauthorized conveyance or long lease of its road, or part thereof, to another company, and abandoning its operation,<sup>96</sup> or to keep its road in repair,<sup>97</sup> or a sale of a part of its

mere fact that a corporation has been alleged insolvent, and a receiver has been appointed, in an action brought against it, does not *ipso facto* forfeit its charter. *Moran v. Lydecker* (1882), 27 Hun, 582.

<sup>89</sup> *Denike v. N. Y., etc. Co.*, 80 N. Y. 599; *People v. Bank of Pontiac*, 12 Mich. 526; *Chicago Mutual, etc. Assn. v. Hunt*, 127 Ill. 257; *St. Louis, etc. Co. v. Sandoval Coal, etc. Co.*, 116 Ill. 170.

<sup>90</sup> *State v. Commercial Bank*, 13 Sm. & M. (21 Miss.) 569, 53 Am. Dec. 106; *State v. Bailey*, 16 Ind. 46, 79 Am. Dec. 405; *Aurora, etc. Co. v. Holthouse*, 7 Ind. 59.

<sup>91</sup> *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574; *Ward v. Farwell*, 97 Ill. 593; *State v. Commercial Bank*, 13 Sm. & M. (21 Miss.) 569, 53 Am. Dec. 106.

<sup>92</sup> *Lumbard v. Stearns*, 4 Cush. 60.

<sup>93</sup> But where the business on a branch road was not sufficient to justify running regular trains, the company was held to be excused, the court saying: "It is contended that the duty is not relative, but absolute; that it is not to be measured by the public wants and exigencies at the time, but is

to be performed at all hazards, or at any sacrifice, unless or until the legislature shall interposes to relieve the corporation from its performance. This position cannot be sustained." *Commonwealth v. Fitchburg R. Co.*, 12 Gray, 180.

<sup>94</sup> *People v. Hillsdale & C. Turnpike Co.*, 23 Wend. 254. And in such a case it is no defense that the act giving the company the power to erect bridges is permissive only. *Washington, etc. Turnpike Co. v. Maryland*, 19 Md. 239.

<sup>95</sup> *State v. Pasumpsic Turnpike Co.*, 3 Vt. 178.

<sup>96</sup> *State v. Pawtucket, etc. Corp.*, 8 R. I. 182, 94 Am. Dec. 133; *State v. Atchison, etc. Co.*, 24 Neb. 143, Am. St. Rep. 164.

<sup>97</sup> *Washington & B. Turnpike Co. v. State*, 3 Wall. 210, where the defense that the legislature had authorized the construction of a railway whereby the tolls of the turnpike were so reduced as to be insufficient to enable the company to keep its road in repair, was disallowed, Nelson, J., delivering the opinion of the court and saying: "It might have been very proper for the state when chartering the railroad to have provided for compensation for the

road to avoid the duty of keeping it in repair,<sup>98</sup> rendering false reports,<sup>99</sup> failing to keep its principal place of business within the State as required by statute,<sup>1</sup> corruptly procuring legislation for its own benefit,<sup>2</sup> and entering into agreements with other corporations whereby the public is deprived of the benefit of competition between them,<sup>3</sup>—have been declared to be sufficient causes for the forfeiture of their charters.<sup>4</sup> But an attempt by a corporation to change its corporate name in a manner not authorized by law, does not avoid its charter.<sup>5</sup>

*Non-user*, only in part, of the franchises of a strictly private corporation, is not ground for forfeiture, as, where a manufacturing corporation failed to manufacture all the things it had authority to manufacture.<sup>6</sup> The mere fact of a lease of its property,

prospective loss to the turnpike company, as has frequently been done in other states under similar circumstances; but this was a question resting entirely with the legislature of the state, and their action is conclusive on the subject. There is another answer to the defense in this case, even assuming that the charter of the turnpike company contained exclusive privileges that forbade the legislature of the state incorporating the railroad company. The remedy was not in neglecting to repair the road, and at the same time collecting the tolls. It was in restraining by proper proceedings the railroad company from constructing its road. The breach of the contract on the part of the state furnished no excuse for the turnpike company in disregarding its part of it, which was a burden, to wit, the repairs, while at the same time insisting upon the observance of the part beneficial, to wit, the collection of the tolls.”

<sup>98</sup> *State v. Pawtucket Turnpike Co.*, 8 R. I. 182.

<sup>99</sup> *Eastern Archipelago Co. v. Regina*, 23 L. J. (N. S.) Q. B. 82, 22 Eng. L. & Eq. 328, where the company falsely reported to the Board of Trade that its capital had all been subscribed.

<sup>1</sup> *State v. Milwaukee, etc. R. Co.*, 45 Wis. 579. So, if an act incorporating a bank authorizes its location in a particular county, the establishment of an agency in another locality at which the banking business is carried on, is a violation of the charter. *People v. Oakland County Bank*, 1 Doug. (Mich.) 282.

<sup>2</sup> *People v. Dispensary & H. Soc.*, 7 Lans. 304, where the company agreed with and paid to a lobbyist so much of an appropriation for its benefit as exceeded five thousand dollars. Cf. *In re White Mts. R. Co.*, 50 N. H. 50.

<sup>3</sup> *Vide infra*, § 1397. See, also, *Richardson v. Buhl* (“The Diamond Match Case,” Mich. 1890), 43 N. W. Rep. 1102; *People v. Chicago Gas Trust Co.* (Ill. 1890), 22 N. E. Rep. 798.

<sup>4</sup> See cases, cited in preceding notes. In Colorado it is provided by statute that a banking corporation which fails, within a year, to pay up its entire capital stock in cash, shall forfeit its charter. *People v. City Bank* (1885), 7 Colo. 226.

<sup>5</sup> *O'Donnell v. Johns & Co.*, 13 S. W. Rep. 476 (Tex. 1890).

<sup>6</sup> *Wadesborough, etc. Co. v. Burns*, 114 N. C. 353, 19 S. E. 238.

is not ground for forfeiture.<sup>7</sup> Issuing watered stock and failing to keep accurate books of account; failure to keep its general office in the State, as required by statute;<sup>8</sup> neglect for a long time to hold meetings prescribed,—does not *ipso facto* dissolve the corporation.<sup>9</sup> Merely wrongful intent is no ground for forfeiture.<sup>10</sup> In general, where other penalty than forfeiture is expressly prescribed for commission or omission of acts, prohibited or required, such misuser or non-user is no ground for forfeiture;<sup>11</sup> but otherwise, where, by a statute in such case, the court in its discretion may impose a fine upon the corporation.<sup>12</sup>

**§ 1295. Injunction proceedings in equity.**—An equity court may enjoin the abuse of a corporate franchise.<sup>13</sup> A corporation may be enjoined from allowing prize-fighting.<sup>14</sup> A railroad may be restrained by injunction from purchasing a competing line of railroad, where such purchase is prohibited.<sup>15</sup> A corporation may be enjoined from illegal purchase of stock in another corporation.<sup>16</sup> Injunction by the State will lie against a lease by a domestic railroad to a foreign corporation, where prohibited by statute, and where it would destroy competition in production of coal.<sup>17</sup> Bill in equity will lie at instance of the federal court, in case of violation of a federal charter.<sup>18</sup> Injunction at instance of the State, will lie against the doing of business illegally in the State, by a foreign corporation.<sup>19</sup>

<sup>7</sup> *In re Franklin Tel. Co.*, 119 Mass. 447.

<sup>8</sup> *State v. Topeka Water Co.*, 59 Kan. 151 (1898); *Simmon v. Norfolk, etc. Co.* (1893), 113 N. C. 147, 22 L. R. A. 677, 37 Am. St. Rep. 614; *State v. Park, etc. Co.*, 58 Minn. 330 (1894), 49 Am. St. Rep. 515; *State v. Milwaukee, etc. Ry.* (1878), 45 Wis. 590; *North, etc. Co. v. People* (1893), 147 Ill. 234.

<sup>9</sup> *State v. Societe Republicaine*, 9 Mo. App. 114; *State v. Barron*, 58 N. H. 370.

<sup>10</sup> *Commonwealth v. Pittsburgh, etc. Ry. Co.*, 58 Pa. St. 26; *State v. Martin*, 51 Kan. 462; *State v. Beck*, 81 Ind. 500; *Att'y-Gen. v. Superior, etc. Co.*, 93 Wis. 604.

<sup>11</sup> *State v. Brownstown, etc. Co.*, 120 Ind. 337; *State v. Real Estate Bank*, 5 Ark. 595, 41 Am. Dec. 109; *People v. Buffalo, etc. Co.*, 131 N.

Y. 140, 15 L. R. A. 240; *People v. Atlantic, etc. R. Co.*, 125 N. Y. 513; *Habersham, etc. Co. v. Taylor*, 73 Ga. 552.

<sup>12</sup> *People v. Kankakee Imp. Co.*, 103 Ill. 491.

<sup>13</sup> *State v. American, etc. Assn.* (1896), 64 Minn. 349.

<sup>14</sup> *Columbian Athletic Club v. State* (1895), 143 Ind. 98, 28 L. R. A. 727, 52 Am. St. Rep. 407.

<sup>15</sup> *Louisville, etc. R. R. v. Commonwealth* (1895), 97 Ky. 675, 31 S. W. 476.

<sup>16</sup> *Trust Co., etc. v. State* (1900), 109 Ga. 736.

<sup>17</sup> *Stockton v. Central R. R.*, 50 N. J. Eq. 52 (1892), 17 L. R. A. 97.

<sup>18</sup> *Vide supra*, §§ 922-932, LEGISLATIVE CONTROL, POLICE POWER OF THE STATE; *United States v. Western U. T. Co.* (1892), 50 Fed. 28, (1895) 160 U. S. 1.

<sup>19</sup> *State v. Southern, etc. Co.*

**§ 1296. Sale or lease of the entire corporate property as ground.**—Sale of the entire corporate property of a solvent private corporation, requires unanimous consent of the stockholders. A single dissenting stockholder may enjoin the sale,<sup>20</sup> and whether or not it be for the purpose of dissolution.<sup>21</sup> Sale of the entire property may be made by consent of a majority of the stockholders, where the corporation is in failing condition.<sup>22</sup> Sale or lease of entire property of a *quasi*-public corporation, as of a railroad, requires express authority of the legislature. The statutes of some of the States provide for buying out dissenting stockholders.<sup>23</sup> In the absence of statutory authority, such a sale to another corporation, in exchange for its bonds or stock, may be enjoined by any dissenting stockholder, and although the offer be to him to pay him for his stock its full cash value.<sup>24</sup> The sale or lease of the entire property will not of itself effect corporate dissolution, where the corporation is prosperous.<sup>25</sup> In the absence of fraud, the fact that a corporation, with the purpose of dissolution, provided for sale of all its property and appointed a trust company to wind up its business, was held not ground for appointment of a receiver, at the instance of a dissenting stockholder.<sup>26</sup>

**§ 1297. Only the State can bring a suit to forfeit the charter.**—The State granted the charter, and no one but the State can take it away. Only the attorney-general can institute a suit to forfeit the charter. Neither directors or stockholders, or any private individual may sustain a suit for forfeiture. Forfeiture

(1900), 52 La. Ann. 1822; *State v. Schlitz, etc. Co.* (1900), 104 Tenn. 715, 18 Am. St. Rep. 941.

<sup>20</sup> *Vide supra*, §§ 830-835, SALE OF ALL THE CORPORATE PROPERTY; *People v. Ballard* (1892), 134 N. Y. 269, 17 L. R. A. 737.

<sup>21</sup> *Harding v. American, etc. Co.* (1899), 182 Ill. 551, 74 Am. St. Rep. 189; *Treadwell v. United, etc. Co.* (1900), 47 N. Y. App. Div. 613; *Elbogen v. Gerbereux, etc. Co.* (1900), 30 N. Y. Misc. 264.

<sup>22</sup> *Doyle v. Leitelt* (1893), 97 Mich. 298; *Plant v. Macon, etc. Co.* (1898), 103 Ga. 666, 30 S. E. 567; *Patterson v. Portland, etc. Works* (1899), 35 Oreg. 96, 56 Pac. 407; *Phillips v. Providence, etc. Co.* (1899), 21 R. I. 302, 45 L. R.

A. 560; *Sewell v. East, etc. Co.* (1893), 50 N. J. Eq. 717; *Skinner v. Smith* (1892), 134 N. Y. 240.

<sup>23</sup> *Boston v. Graham* (1901), 60 N. E. 405, 179 Mass. 62.

<sup>24</sup> *Forrester v. Boston, etc. Co.* (1898), 21 Mont. 544, 55 Pac. 229; *Morris v. Elyton, etc. Co.* (1900), 125 Ala. 263, 28 So. 513.

<sup>25</sup> *Parker v. Bethel Hotel Co.*, 96 Tenn. 252 (1896), 31 L. R. A. 706; *Harding v. American, etc. Co.*, 182 Ill. 551 (1899), 74 Am. St. Rep. 189; *Treadwell v. United, etc. Co.* (1900), 47 N. Y. App. Div. 613; *People v. Ballard* (1892), 136 N. Y. 639, 17 L. R. A. 737.

<sup>26</sup> *Knott v. Evening Post Co.*, 124 Fed. 342 (1903).

can be made only by decree of court in a suit brought for that purpose by the State.<sup>27</sup> And although the corporation is only such *de facto*, no one but the State can question the validity of its corporate existence.<sup>28</sup> Nor will the courts of any foreign State question the regularity of incorporation, where a charter was granted to a corporation in the State which created it.<sup>29</sup> Only the state can enforce a constitutional prohibition against holding of land by a corporation, for more than ten years, when not actually occupied by it. A mere squatter on land can not assert the lapse of the corporate title.<sup>30</sup> A judgment of forfeiture is void, where the State is not a party to the suit.<sup>31</sup> Although the statute may make forfeiture the penalty for non-payment of taxes, the secretary of State can not declare the charter forfeited.<sup>32</sup> A private person can not, unless authorized by statute,<sup>33</sup> institute judicial proceedings against a corporation for the purpose of obtaining a decree of forfeiture. Such suits are to be brought by the State alone.<sup>34</sup> For it is with the State that the contract is made, upon breach of which the charter of a corporation may be forfeited;

<sup>27</sup> Coquard v. National L. Co. (1898), 171 Ill. 480; Smith v. Cornelius (1895), 41 W. Va. 59.

<sup>28</sup> City of Greenville v. Greenville, etc. Co. (1900), 125 Ala. 625, 27 So. 764.

<sup>29</sup> Lancaster v. Amsterdam Imp. Co. (1894), 140 N. Y. 576, 24 L. R. A. 322.

<sup>30</sup> Pere Marquette R. Co. v. Graham, 99 N. W. 408.

<sup>31</sup> Pickett v. Abney (1892), 84 Tex. 645, Detroit Leg. News, 69, Mich. 1904.

<sup>32</sup> Fox v. Robbins (Tex. 1901), 62 S. W. 815; Greenbrier, etc. Co. v. Ward (1887), 30 W. Va. 43, 3 S. E. 227.

<sup>33</sup> Gaylord v. Fort Wayne, etc. R. Co., 4 Biss. 286; Commonwealth v. Alleghany Bridge Co., 20 Pa. St. 185; Baker v. Backus, 32 Ill. 79; North v. State, 107 Ind. 356; Wilmersdoerffer v. Lake Mahopac Imp. Co., 18 Hun, 387; Stout v. Zulick, 48 N. J. 399. But a statute giving a remedy to any citizen does not affect the remedies of the commonwealth. Commonwealth v. Towanda Waterworks (Pa. 1888),

15 Atl. Rep. 440. Cf. Western Pennsylvania R. Co.'s Appeal, 104 Pa. St. 399 (1885).

<sup>34</sup> People v. Rensselaer, etc. R. Co., 15 Wend. 113; People v. Northern R. Co., 42 N. Y. 217; Strong v. McCagg, 55 Wis. 624, 628; Rice v. National Bank, 126 Mass. 300, 304; Briggs v. Cape Cod, etc. Canal Co., 137 Mass. 71, 72; Folger v. Columbian Ins. Co., 99 Mass. 267, 96 Am. Dec. 747 (annotated); Commonwealth v. Union Ins. Co., 5 Mass. 230; Chesapeake & O. Canal Co. v. Baltimore & O. R. Co., 4 G. & M. (Md.) 1; Regents of University of Maryland v. Williams, 9 Gill & J. 365, 31 Am. Dec. 72, 111; Lord v. Essex Building Assn. No. 4, 37 Md. 327; State v. Fourth N. H. Turnpike, 15 N. H. 162; State v. Boston, etc. R. Co., 25 Vt. 433; Kruffet v. Great Western R. Co., 25 Ill. 353. Even in Pennsylvania under the act of June 19, 1871, authorizing a private citizen by bill in equity to compel a corporation to show that it has authority to do a certain act, he cannot prove the mere non-

and it is for the State alone to determine whether the forfeiture shall be enforced, or waived.<sup>35</sup> Suits to enforce the forfeiture are brought on behalf of the State by the attorney-general, who may proceed therein of his own motion without an express act of legislature authorizing him so to do;<sup>36</sup> and in construing the provision of the New York Code of Civil Procedure, which confers upon the attorney-general the power to sue a corporation to vacate its charter, it is held that the words "upon leave granted" do not authorize the court to inquire whether the suit is a wise act, but only whether the attorney-general alleges a *prima facie* case, or a case of such gravity that it should be judicially determined.<sup>37</sup> Ordinarily, the corporation itself is a necessary party to a bill to declare a forfeiture of its franchises, or to divest it of any of its property, or rights.<sup>38</sup> But if the information has for its object to test the fact of legal corporate existence, it should be filed against the individuals assuming to act as a corporation; for, it

user of a franchise in order to establish a forfeiture of the charter. Western Pennsylvania R. Co.'s Appeal (1885), 104 Pa. St. 399.

<sup>35</sup> In Regents of the University of Maryland v. Williams, 9 Gill & J. 365, 31 Am. Dec. 72, 111, it was said: "For the government, with which the contract is made, may not wish to enforce the forfeiture, and may, if it choose to do so, waive the breach of any condition of the contract arising out of the charter." See further upon the subject of waiver, § 59, *infra*.

<sup>36</sup> State v. Southern R. Co., 24 Tex. 80. Thus in People v. Stanford (1888), 77 Cal. 360, under the California Code of Civil Procedure, § 803, providing that an action may be brought by the attorney-general for the usurpation of a franchise, and Civil Code, § 358, authorizing an inquiry as to the right of a corporation to exercise corporate power at suit of the state, on information of the attorney-general, the people may maintain an action at the relation of that officer, to compel a railroad corporation to forfeit its

franchises and restrain the exercise of the same.

<sup>37</sup> *In re Application of Attorney-General* (1889), 50 Hun, 511, construing N. Y. Code Civ. Proc., § 1798.

<sup>38</sup> Mickles v. Rochester City Bank, 11 Paige, 118, 42 Am. Dec. 103, 106, 107, the court saying: "Where the corporate property of a manufacturing corporation is all exhausted, and the bill is filed against the stockholders by a creditor of the company, for the mere purpose of enforcing the personal liability of the stockholders for the debts of the company, it may not be necessary to make the corporation itself a party, although its dissolution has not been judicially declared. But where the object of the bill is to divest the corporation itself of any of its property, or of any of its corporate rights or privileges, upon the ground that it has forfeited its charter, or surrendered its franchises, the other defendants in the suit may have a right to insist that the corporation itself shall be made a party, to the end that the decree may be bind-

is said, that to make the *pseudo* corporation itself the defendant, would be to acknowledge its existence.<sup>39</sup>

**§ 1298. The act of forfeiture is not to be collaterally tried.**—It is well settled that acts or omissions on the part of a corporation, which would subject its charter and franchises to forfeiture (in proceedings against it instituted by the State for the director purpose of enforcing the penalty), can not be collaterally pleaded in suits between the corporation and other persons.<sup>40</sup> The only

ing upon such corporation, and that the other defendants may not be subjected to future litigation with the corporation itself in relation to the same matters." An information to dissolve a corporation, praying for no citation, showing that in some way not disclosed the corporation was in the hands of a receiver, who, though not alleged to have been served, was the only person who appeared, no service having been made on the person alleged to have been the last president, and no appearance entered for him, was held properly dismissed. *State v. Jefferson Iron Co.*, 60 Tex. 312.

<sup>39</sup> *People v. Railway Co.*, 15 Wend. 114; *People v. Richardson*, 4 Cow. 97; *Commonwealth v. Central Passenger Ry. Co.*, 52 Pa. St. 506; *People v. Stanford* (1888), 77 Cal. 360; *Draining Co. v. State*, 43 Ind. 236; *Le Roy v. Cusacke*, 2 Rolle, 113; "How Corporate Existence Attacked by *Quo Warranto*" (1889), 40 Alb. L. J. 10. But see *People v. Flint*, 64 Cal. 49.

<sup>40</sup> *Vide supra*, §§ 1001, COLLATERAL ATTACK; *Southern Pac. R. Co. v. Orton* (1887), 32 Fed. Rep. 457; *Briggs v. Cape Cod Ship Canal Co.* (1884), 137 Mass. 71; *Rice v. National Bank*, 126 Mass. 300; *Greenbrier Lumber Co. v. Ward*, 30 W. Va. 43 (1887); *State v. Butler*, 15 Lea, 104 (1886), *Asheville Division v. Aston* (1886), 92 N. C. 578; *Atlanta v. Gate City Gas Light Co.* (1885), 71 Ga. 106. In *Riddle v. Proprietors of Locks and Canals*, 7 Mass. 169, it was held that the

plaintiff, averring a loss arising from the failure of the defendants to dig their canal to the depth required by their charter, and from their failure to cleanse the channel from deposits of silt, could not recover on account of the former, but that he was entitled to damages for injuries arising through their neglect to keep the canal free from obstructions. See also *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 10 Mo. App. 401. *Toledo & A. A. R. Co. v. Johnson* (1883), 49 Mich. 148; *Barren Creek Ditching Co. v. Beck* (1885), 99 Ind. 277; *Logan v. Vernon, G., etc. R. Co.* (1884), 90 Ind. 552; *Thompson v. New York, etc. R. Co.*, 3 Sandf. Ch. 625; *Central Crosstown R. Co. v. Twenty-Third Street Ry. Co.*, 54 How. Pr. 168; *In re New York Elevated R. Co.*, 70 N. Y. 327. Thus where the defendant pleaded the failure of a canal company to perform its duty in keeping the canal in repair, as a defence to an action to recover toll, the court said: "If the canal was opened, and toll claimed, and the public did not interfere, and the defendant used the canal, he thereby subjected himself to the payment of the toll. By demanding the toll the plaintiff claims to have complied with the conditions and provisions of the act of incorporation; and the defendant, by using the canal, is estopped to deny the right of the corporation to the toll, although it might be proceeded against by *quo warranto*

competent evidence to prove a forfeiture, is the judgment of a court directly on the point.<sup>41</sup> Since the people, for whose benefit corporations are supposed to be created, may in their sovereign capacity waive a cause of forfeiture, it does not lie in the mouth of any private citizen to insist upon an enforcement of the penalty, incidentally to the main issue of his case.<sup>42</sup> On the other hand the corporation cannot be permitted to plead its own abuse of its franchises, or failure to perform its public duties, for the purpose of avoiding any obligation by which it may be bound.<sup>43</sup> Accordingly, a plea involving a forfeiture of the charter, is open to demurrer, or may be treated as a nullity by the court.<sup>44</sup> Even where, through non-compliance with the conditions of its charter, or the general act under which it claims to be organized, a company has never acquired a *de jure* corporate existence, a person may so deal with it as to be estopped to deny the legality of its incorporation.<sup>45</sup>

for the repeal and dissolution of the charter, or by indictment for a misdemeanor in not keeping the canal in repair." Proprietors of Quincy Canal v. Newcomb, 7 Metc. 276. New Jersey So. R. Co. v. Long Branch Comm'r's, 39 N. J. 28; Crump v. United States Mining Co., 7 Gratt. 352; Hamilton v. Annapolis R. Co., 1 Md. Ch. 107; Connecticut, etc. R. Co. v. Bailey, 24 Vt. 465; Irvine v. Lumberman Bank, 2 Watts & Serg. 204; Dyer v. Walker, 40 Pa. St. 157; West v. Carolina Ins. Co., 31 Ark. 476; Beach on Railways, §§ 589, 590.

<sup>41</sup> Cleveland, etc. R. Co. v. Speer, 56 Pa. St. 325, 94 Am. Dec. 84; Trustees of Vernon v. Hills, 6 Cow. 23, 16 Am. Dec. 429.

<sup>42</sup> Greenbrier Lumber Co. v. Ward (1887), 30 W. Va. 43, where the corporation had failed to pay its license tax, and holding that the rule in this respect had not been altered by W. Va. Acts of 1885, ch. 20, § 8. In Heard v. Talbot, 7 Gray, 115, it was said: "It would be a great anomaly to allow persons not parties to a contract to insist on its breach and enforce a penalty for its violation, but it would be against public

policy, and lead to confusion of rights if corporate powers and privileges could be disputed and defeated by every person who might be aggrieved by their exercise. Therefore it has often been held that a cause of forfeiture, however great, cannot be taken advantage of or enforced against corporations collaterally or incidentally, or in any other mode than by a direct proceeding for that object in behalf of the government." See also Rex v. Amery, 2 Term Rep. 515; Rex v. Pasmore, 3 Term Rep. 199; Turret v. Taylor, 9 Cranch, 43; Sleet v. Bloom, 5 Johns. Cr. 366, 19 Johns. 456; Trustees of Vernon v. Hills, 6 Cow. 23; McLaren v. Pennington, 1 Paige, Ch. 102; Chesapeake & O. Canal Co. v. Baltimore & O. R. Co., 4 Gill & J. 1.

<sup>43</sup> Dyer v. Walker, 40 Pa. St. 157.

<sup>44</sup> Dyer v. Walker, 40 Pa. St. 157.

<sup>45</sup> Broadwell v. Merritt (1885), 87 Mo. 95; Smith v. Sheely, 12 Wall. 361; Kansas City Hotel v. Hunt, 57 Mo. 126; Farmers' & M. Ins. Co. v. Needles, 52 Mo. 17; Ohio & M. R. Co. v. McPherson, 35 Mo. 13; Stoutimore v. Clark, 70 Mo. 471; National Ins. Co. v. Bow-

§ 1299. Waiver by the State of its right to forfeit the charter. The State may waive any breach of the provisions of its charter by a corporation, which if insisted on would be a cause of forfeiture.<sup>46</sup> And after such a waiver, forfeiture can not be set up or enforced by either the State or by individuals. Thus, where

man, 60 Mo. 252; St. Louis v. Shiels, 62 Mo. 247. In a recent case in Kentucky it was held that an association which has filed articles of incorporation for record in the office of the clerk of the county court, as required by Gen. St. Ky., ch. 56, may begin business, and its acts are valid, though it has failed to comply with the further requirement to file a copy of its articles with the Secretary of State within three months. Such failure is available only in a direct proceeding to annul the franchise. Portland & G. Turnpike Co. v. Bobb (Ky. 1889), 10 S. W. Rep. 794. In an earlier case in the same state, in view of the fact that under the statute above cited a corporation is allowed to commence business as soon as its articles are filed in the county clerk's office; that the legality of the incorporation is required to be presumed; that neither the corporators themselves nor those sued by the corporation are allowed to deny it; and that the franchise can only be annulled by direct proceedings, it was held that the failure of a turnpike company to file articles in the office of the Secretary of State within three months after filing them in the county clerk's office, as required, would not invalidate its organization so as to affect the validity of a tax voted for building a turnpike, although section 6 of the act provides that the acts of corporations shall be valid if the required copy of the articles is filed in the office of the Secretary of State within three months. Walton v. Riley (1887), 85 Ky. 413. So, where a corporation fails to

comply with the statutory requirements as to the payment of capital stock, making annual reports, *et cetera*, that fact will not invalidate a loan made in good faith, in the usual course of business, to such corporation. Lippincott v. Shaw Carriage Co., 25 Fed. Rep. 577. But see Waterman on Corporation, § 430, where the author says: "When a company never had any corporate existence so as to enable it to take and hold property in a corporate name, that fact may be inquired into in a collateral proceeding. And so, if, professing such existence, it acquires for a particular purpose in a corporate name the property of another, as it has no power as such to take, neither can it transfer; and the sufficiency of a transfer made by it may be inquired into collaterally."

<sup>46</sup> State v. Portland, etc. Oil Co., 153 Ind. 483, 53 L. R. A. 413, 74 Am. St. Rep. 314; People v. Kankakee R. I. Co., 103 Ill. 491; State v. Equitable, etc. Assn., 142 Mo. 325; State v. Crawfordsville & S. Turnpike Co. (1886), 102 Ind. 283; People v. Ottawa Hydraulic Co. (1886), 115 Ill. 281; *In re New York Elevator R. Co.*, 70 N. Y. 338; People v. Phoenix Bank, 24 Wend. 431, 35 Am. Dec. 634, 1 Smith's Cas. 373; Commonwealth v. Union Ins. Co., 5 Mass. 230; Briggs v. Cape Cod Ship Canal Co. (1884), 137 Mass. 71; Kellogg v. Union Co., 12 Conn. 7; State v. Fourth N. H. Turnpike Co., 15 N. H. 162, 41 Am. Dec. 690, 1 Smith Cas. 370. See note to *Ottaquechee Woolen Co. v. Newton* (Vt. 1885), by H. C. Black, 21 Cent. L. J. 432, 434; Beach on Railways, § 591.

a condition subsequent is grafted upon the charter, in defeasance of a vested franchise, the charter may be avoided on breach thereof, if the State chooses to take advantage of it; if not, the franchise continues, notwithstanding the breach of the condition.<sup>47</sup> But the waiver must be clearly manifest, and where a corporation forfeits its charter by misuser of its franchises, mere subsequent good behavior in such respects, will not legally atone for such a cause of forfeiture.<sup>48</sup> The intention of the State to waive the forfeiture may be shown either by an enactment of the legislature expressly remitting the penalty, or by legislative recognition of the corporation, after the cause of forfeiture becomes known,<sup>49</sup> or by long con-

<sup>47</sup> See note to, *Ottaquechee Woolen Co. v. Newton* (Vt. 1885), by H. C. Black, 21 Cent. L. J. 432, 434, citing *Chesapeake & O. Canal Co. v. Baltimore & O. R.*, 4 Gill & J. 1.

<sup>48</sup> *People v. Fishkill, etc. Co.*, 27 Barb. 445.

<sup>49</sup> *In re New York Elevated R. Co.*, 70 N. Y. 388; *Attorney-General v. Petersburg, etc. R. Co.*, 6 Ired. 456; *Attorney-General v. Superior, etc. Co.*, 93 Wis. 604; *State v. Bank of Charleston*, 2 McMullen, 441; *Enfield Bridge Co. v. Connecticut River Co.*, 7 Conn. 28; *People v. Phoenix Bank*, 24 Wend. 431; *Commonwealth Bank v. State*, 6 Sm. & M. 599; *State v. Godwinsville, etc. Road Co.* (1882), 44 N. J. 496, 501, holding that a condition contained in the charter of a turnpike road company that its road should be constructed in a certain manner before tolls should be levied thereon, was waived by a supplementary act giving authority to take tolls in a new mode inconsistent therewith; and that accordingly the breach of the condition by erecting a toll gate before the road was properly improved could not be taken advantage of as a ground of forfeiture; *Basshor v. Dressel*, 34 Md. 503; *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. 1; *In re Mechanics' Society*, 31 La. Ann. 627; *People v. Ottawa*

*Hydraulic Co.*, 115 Ill. 281; *Central Georgetown R. Co. v. People*, 5 Colo. 39; *Kanawha Coal Co. v. Kanawha, etc. Coal Co.*, 7 Blatchf. 391; *Central Crosstown R. Co. v. Twenty-Third St. R. Co.*, 54 How. Pr. 186; *State v. Vincennes University*, 5 Ind. 77; *Baltimore & O. R. Co. v. Marshall Co.*, 3 West Va. 319; *Ormsby v. Vermont Copper Mining Co.*, 65 Barb. 360; *Briggs v. Cape Cod Ship Canal Co.* (1884), 137 Mass. 71, where the acceptance of United States bonds by the state treasurer, in lieu of a deposit of \$200,000 required by the charter of the canal company to be made with him before beginning to construct, was held to be a waiver of any ground of complaint on the score of the deposit not being in money; *Rice v. National Bank*, 126 Mass. 300; *Folger v. Columbian Ins. Co.*, 9 Mass. 267, 274; *Commonwealth v. Union Ins. Co.*, 5 Mass. 230; *Boston Glass Manuf. Co. v. Langdon*, 24 Pick. 49; *Heard v. Talbot*, 7 Gray, 113; *Beach on Railways*, § 591. In *People v. Ottawa Hydraulic Co.* (1886), 115 Ill. 281, it was held that the legislature, by recognizing the existence of a corporation which had been doing a different business than that authorized by the general law under which it was originally incorporated, and by enlarging its powers, may waive the state's right to

tinued failure on the part of the judicial department of the government to enforce the forfeiture.<sup>50</sup> But lapse of time is no bar to proceedings by the State against persons assuming to act as a corporation, without having ever acquired the legal right so to do,—the exercise of the franchise in such a case being a continuous usurpation.<sup>51</sup> But where, in face of knowledge of grounds for forfeiture, there has been long delay, pending which the corporation has continued its operation, and has incurred large expense therein assuming that such grounds were waived,—that will be

seek a forfeiture. The acceptance by the legislature of accounts which corporations are required by statute to submit, or acts authorizing railway or turnpike companies to effect a change of route, are examples of such subsequent recognition as will be deemed a waiver of a ground of forfeiture. *State v. Fourth N. H. Turnpike Co.*, 15 N. H. 162; *People v. Fishkill P. R. Co.*, 27 Barb. 460; *Central Crosstown R. Co. v. Twenty-Third St. R. Co.*, 54 How. Pr. 168; *In re N. Y. Elevated R. Co.*, 70 N. Y. 327; *In re Mechanics' Soc.*, 31 La. Ann. 627; *White's Creek Turnpike Co. v. Davidson*, 3 Tenn. Ch. 396; *La Grange, etc. R. Co. v. Rainey*, 7 Coldwell (Tenn.), 420. The declaration of the legislature that, if the holders of a franchise to collect tolls for the navigation of an artificial channel shall permit the channel to become so obstructed as to impede navigation, "the collection of tolls by them shall be suspended until all obstructions shall be removed or said channel deepened to the depth heretofore specified," amounts to a waiver of the right to have a forfeiture of the franchise declared for such cause. Particularly where the obstruction is only temporary, and not serious, and where a municipal corporation is the real owner of the privilege, and the person holding the franchise, and who were responsible for the obstruc-

tion, have no other means of payment of their claim for opening the channel. *State v. Morris*, 73 Tex. 435.

<sup>50</sup> In *People v. Oakland County Bank*, 1 Doug. (Mich.) 282, where the charter of the defendant provided that unless a certain sum therein named was paid in within two years, the act of incorporation should be void, it was held that it would be unreasonable and unjust, seven years after granting the charter, to oust the corporation from its franchises for this reason, even if there was evidence of the non-payment of the sum pursuant to the requirement. In an Indiana case an incorporated turnpike company in good faith attempted to consolidate with another one. Twelve years afterwards the consolidation was declared void. The company then resumed possession of its property, and for a year continued to exercise its franchises, and it was held that it should not be deemed to have forfeited them. *State v. Crawfordsville & Shannondale Co.* (1886), 102 Ind. 283.

<sup>51</sup> *State v. Bailey*, 19 Ind. 452; *State v. Janesville Water Co.*, 92 Wis. 496, 32 L. R. A. 759; *Kellogg v. Union Co.*, 12 Conn. 7; *People v. Pullman Palace Car Co.*, 175 Ill. 125; *State v. Pawtucket Turnpike Corp.*, 8 R. I. 521, 94 Am. Dec. 123; *State v. Norwalk, etc. Co.*, 10 Conn. 157.

held a waiver.<sup>52</sup> And if, by the terms of the charter, the franchise is declared to be forfeited absolutely on failure to perform a condition, the doctrine of waiver by subsequent legislative recognition is inapplicable.<sup>53</sup> "When a legislature has full power to create corporations, its act recognizing as valid a *de facto* corporation, whether private or municipal, operates to cure all defects in steps leading up to the organization, and makes a *de jure*, out of what before was only a *de facto*, corporation."<sup>54</sup> The right to forfeit a charter for failure to commence business within the required time, is waived by the State by its amendment of the charter.<sup>55</sup> It waives informalities in the incorporation, and illegal issue of watered stock by a statute authorizing reduction of the capital stock.<sup>56</sup> Expiration of time given by the legislature to a railway to complete its construction, may waive right to forfeit charter for failure to complete within the time originally required.<sup>57</sup>

**§ 1300. Right of the State to proceed, in what cases of ultra vires acts.**—Wilful assumptions and intentional usurpations of corporate authority or any abuse, misuse, or non-use of its franchises, justifies a proceeding by the State by or in the nature of *quo warranto*, and a judgment of forfeiture of the franchise possessed,<sup>58</sup> or to oust the corporation from the exercise of the unauthorized power.<sup>59</sup> The misuser or usurpation of any franchise has from the earliest times been corrected by an information, and the writ of *quo warranto*. A franchise being a portion of the royal prerogative existing in the hands of a subject, to misuse or usurp this delegated right is a clear infringement in which the sovereign is directly interested. On this ground the remedy under consideration is still resorted to.<sup>60</sup> It is well settled that it is a tacit condition of a grant of incorporation that the grantees

<sup>52</sup> *People v. Stanford* (1888), 77 Cal. 360.

<sup>53</sup> *State v. Fourth N. H. Turnpike Co.*, 15 N. H. 162.

<sup>54</sup> *Comanche County v. Lewis* (1900), 133 U. S. 198.

<sup>55</sup> *Farnsworth v. Lime Rock, etc. R. R.* (1891), 83 Me. 440.

<sup>56</sup> *State v. Webb* (1896), 110 Ala. 214, 20 South. 462.

<sup>57</sup> *State v. Bergen Neck Ry.* (1890), 53 N. J. L. 108.

<sup>58</sup> *High on Extr. Rem.*, § 616; *State v. Wadkins*, 15 Ohio St. 114; *State v. Taylor*, 15 Ohio St. 137;

*Updegraff v. Evans*, 47 Pa. St. 103; *Hullman v. Houcomp*, 5 Ohio St. 237; *Commonwealth v. Commercial Bank*, 28 Pa. St. 383; *People v. Kingston, etc. Co.*, 23 Wend. 193; *Mumma v. Potomac Co.*, 8 Pet. 287; *Terrett v. Taylor*, 9 Cranch, 43.

<sup>59</sup> *People v. River, etc. Co.*, 12 Mich. 389, 86 Am. Dec. 64.

<sup>60</sup> *People v. Utica Ins. Co.*, 15 Johns. 353; *State v. Milwaukee, etc. Ry. Co.*, 45 Wis. 579; *State v. Barron*, 57 N. H. 498.

shall act up to the end or design for which they were incorporated, and hence through neglect or abuse of its franchises a corporation may forfeit its charter, as for condition broken.<sup>61</sup> It may be affirmed as a general principle, that where there has been a misuser or non-user in regard to matters which are of the essence of the contract between the corporation and the State, and the acts or omissions complained of have been repeated and wilful, they constitute a just ground of forfeiture.<sup>62</sup> Thus if a corporation, authorized to do an insurance business, embarks in a general banking business, a judgment of forfeiture or ouster would be a proper one in any court having jurisdiction of the matter.<sup>63</sup> But proceedings can not be maintained by the attorney-general to restrain a corporation from doing *ultra vires* acts which are acquiesced in by all the shareholders and are not injurious to the rights of creditors, unless they be shown to be illegal,—that is, in contravention of some statute, or *mala per se*, or against public policy.<sup>64</sup> Such a proceeding has been entertained where a railroad was acquiring a monopoly of the coal trade of a certain district.<sup>65</sup> And it may be resorted to in cases of public nuisance such as affect or endanger the public safety or convenience, and require immediate judicial interposition.<sup>66</sup> In all other cases the proper proceeding is by *quo warranto* to oust the corporation from its franchises.<sup>67</sup> The right of forfeiture for misuser or non-

<sup>61</sup> Commonwealth v. Commercial Bank, 28 Pa. St. 383.

<sup>62</sup> Commonwealth v. Commercial Bank, 28 Pa. St. 383.

<sup>63</sup> People v. Utica Ins. Co., 15 Johns. (N. Y.) 358.

<sup>64</sup> Attorney-General v. Tudor Ice Co., 104 Mass. 237, 6 Am. Rep. 227, and authorities there reviewed at length; United States v. Union Pacific R. Co., 98 U. S. 569; Attorney-General v. Utica Ins. Co., 2 Johns. Ch. 371, and authorities there reviewed; Attorney-General v. Great Eastern Ry. Co., 11 Ch. Div. 449; Attorney-General v. Cockermouth Local Board, 18 Eq. 172; Attorney-General v. Reynolds, 1 Eq. Cas. Ab. (3d. ed.) 131; Browne & Theobald's Ry. L. 97. *Contra*, Hare v. London, etc. Ry. Co., 2 Johns. & H. 80, 111; Liverpool v. Chorley Water Works Co.,

2 De Gex, M. & G. 852, 860; Ware v. Regents' Canal Co. 3 De Gex & J. 212, 228, which, however, are declared mere *dicta* in Attorney-General v. Tudor Ice Co., 104 Mass. 237, 6 Am. Rep. 227.

<sup>65</sup> Attorney-General v. Great Northern Ry. Co., 1 Dr. & S. 154.

<sup>66</sup> District-Attorney v. Lynn, etc. R. Co., 16 Gray, 242; Attorney-General v. Cambridge, 16 Gray, 553; Attorney-General v. Boston Wharf Co., 12 Gray, 553; Rowe Granite Co. v. Bridge Co., 21 Pick. 344, 347; Attorney-General v. Shrewsbury Bridge Co., 21 Ch. Div. 752; Browne & Theobald's Ry. Law, 97.

<sup>67</sup> People v. Utica Ins. Co., 15 Johns. (N. Y.) 358; Attorney-General v. Tudor Ice Co., 104 Mass. 237, 6 Am. Rep. 227.

user of its franchises, is annexed as an implied condition to the existence of every corporation, and is reserved to the State, without express mention, in the grant of every charter.<sup>68</sup> Of course the forfeiture may only be made by the sovereign power.<sup>69</sup> The question of forfeiture can not be raised in a collateral proceeding.<sup>70</sup> So whether a corporation has misused or abused its franchise is a question between the State and the corporation, which can not be raised or litigated in an action between the corporation and private parties.<sup>71</sup> Thus a plaintiff corporation, having shown no violation of duty to itself, can not complain of the acts of defendant corporation on the ground of *ultra vires*. Only the State or defendant's stockholders can maintain an action on that ground.<sup>72</sup> An "association, or number of persons," who, in conducting the business of insurance, profess to limit their liability to the amount of money contributed by each, and assume to give perpetuity to the business by making membership certificates transferable by the assignment of the member or his personal representatives,—are "acting as a corporation," so as to authorize a judgment of ouster on *quo warranto* where they are not legally incorporated.<sup>73</sup> In *quo warranto* proceedings against a corporation based on informalities and irregularities in its attempt to organize, judgment of ouster was rendered against it; but it was held, notwithstanding, that transactions had in good faith between it and others, before the institution of the *quo warranto* proceedings, were valid, it having acted as a corporation *de facto*.<sup>74</sup> The declaration of a

<sup>68</sup> Ferrett v. Taylor, 9 Cranch, 43.

<sup>69</sup> Mumma v. Potomac Co., 8 Pet. 281; Commonwealth v. Union, etc. Co., 5 Mass. 230.

<sup>70</sup> Bank of Missouri v. Merchants' Bank, 10 Mo. 123.

<sup>71</sup> Southern Pac. R. Co. v. Orton (1887), 32 Fed. Rep. 457. The right to object to the legal capacity of a corporation to hold real estate is vested in the commonwealth alone. Hickory Farm Oil Co. v. Buffalo, etc. R. Co., 32 Fed. Rep. 22. Accordingly a deed of land to a corporation is valid, even though it is prohibited by its charter from holding real estate, until the state vacates such deed by a direct proceeding instituted

for that end. Mallett v. Simpson, 94 N. C. 37, 55 Am. Rep. 594. And a conveyance of land to a foreign corporation forbidden by statute to acquire and hold real estate, is not void, but passes the title to the corporation, and it may hold the property subject to the commonwealth's right of escheat. Hickory Farm Oil Co. v. Buffalo, etc. R. Co., 32 Fed. Rep. 22. Cf. Commonwealth v. New York, etc. R. Co., 114 Pa. St. 340.

<sup>72</sup> Belcher's, etc. Co. v. St. Louis, etc. Co. (1890), 13 S. W. Rep. 822.

<sup>73</sup> Greene v. People (Ill. 1889), 21 N. E. Rep. 605; Ill. Rev. Stat. ch. 112.

<sup>74</sup> Perun Society v. Cleveland, 43 Ohio St. 481.

forfeiture has been decided not to be in violation of the law forbidding the impairing of the obligation of contracts.<sup>75</sup> When a charter is repealed by the legislature, the State need not first, by judicial process, prove a breach of its conditions. In this case the *onus probandi* is on the corporation disputing the validity of the repealing act.<sup>76</sup> Though a charter is repealed by the mere passage of a statute, judgment of ouster can be obtained only in a court of law.<sup>77</sup> If a charter contains a condition subsequent, in defeasance of the franchises, it may be forfeited on the happening of that condition, but the franchises continue, if the State does not choose to take advantage of the breach.<sup>78</sup>

**§ 1301. Procedure to forfeit. Jurisdiction and powers of the courts.**—A decree of forfeiture can be rendered only by a court of the State from which the corporation received its charter.<sup>79</sup> When the legislature reserves the unconditional right to annul the charter of a corporation in case of misuser of its powers, it is held that the legislature may exercise the reserved right, without the interposition of a judicial tribunal.<sup>80</sup> But even in such case, a court should pass upon the question of abuse of corporate powers, or failure to exercise them, preliminary to legislative action.<sup>81</sup> Neither can adjudge a forfeiture of the franchise of a foreign corporation; though to prevent abuse of trust and to protect or enforce private rights, the legislature of any one State has jurisdiction to interfere with the acts of a foreign corporation doing business within such State; and the courts of any State may inquire into the question whether a foreign corporation has forfeited its right to exist, by reason of its own act having worked a dissolution. Proceedings to that end, whether brought by stockholders or other private individuals, should generally be instituted

<sup>75</sup> Aurora, etc. Co. v. Holthouse, (1868), 51 Barb. (N.) 378; Soc. etc. v. City of New Haven (1823), 7 Ind. 59.

<sup>76</sup> Erie, etc. R. Co. v. Casey, 26 Pa. St. 287.

<sup>77</sup> People v. Hillsdale, etc. Co., 23 Wend. 254.

<sup>78</sup> Canal Co. v. Railway Co., 4 Gill & J. 1.

<sup>79</sup> Carey v. Cincinnati, etc. R. Co., 5 Iowa, 357; Importing, etc. Co. v. Locke (1874), 50 Ala. 332;

Murray v. Vanderbilt (1863), 39 Barb. (N. Y.) 140; Merrick v. Van Santvord (1866), 34 N. Y. 208;

Howell v. Chicago, etc. Ry. Co. (1868), 51 Barb. (N.) 378; Soc. etc. v. City of New Haven (1823), 7 Ind. 59.

<sup>80</sup> Miners' Bank v. United States, 1 Greene (Iowa), 553; Erie, etc. Ry. Co. v. Casey, 26 Pa. St. 287;

Commonwealth v. Pittsburgh, etc. Ry. Co., 58 Pa. St. 26.

<sup>81</sup> Flint, etc. Co. v. Woodhull, 25 Mich. 99, 12 Am. Rep. 233; Mayor of Balto. v. Pittsburgh, etc. Co., 1 Abb. (U. S.) 9; Commonwealth v. Proprietors, etc., 2 Gray, 339.

in a court of law, since courts of chancery have no power, unless by statute, to forfeit the charters or decree the dissolution of corporations.<sup>82</sup> And by whomsoever the proceeding is brought, the remedy is only at law. Courts of equity, without express authority of statute, have no jurisdiction to decree a forfeiture for misuser or non-user of a corporate charter; and this is so, even if the attorney-general institutes the proceeding on behalf of the State.<sup>83</sup> Nor can a court of equity, on the ground of fraud, decree a forfeiture of charter. The remedy is only by *quo warranto*.<sup>84</sup>

<sup>82</sup> *Denike v. New York, etc. Lime Co.*, 80 N. Y. 599; *Buffalo, etc. R. Co. v. Cary*, 26 N. Y. 75; *Baker v. Administrator of Backus*, 32 Ill. 79; *Neall v. Hill*, 16 Cal. 145; *Gaylord v. Fort Wayne, etc. Co.*, 6 Biss. 286; *Attorney-General v. Tudor Ice Co.* (1870), 104 Mass. 239, declaring that the Supreme Judicial Court of Massachusetts, "sitting in equity, does not administer punishment or enforce forfeitures for transgressions of law;" *Attorney-General v. Clarendon*, 17 Ves. 491; *President, etc. v. City Bridge Co.*, 2 Beas. 46; *State v. Merchants' Ins. Co.*, 8 Humph. 235; *Bayless v. Orne*, 1 Freeman (Miss.), Ch. 161; *Strong v. McCagg*, 55 Wis. 624; *Bangs v. McIntosh*, 23 Barb. 591; *Howe v. Deuel*, 43 Barb. 504; *Doyle v. Peerless Petroleum Co.*, 44 Barb. 239; *Belmont v. Erie R. Co.*, 52 Barb. 637. In *Attorney-General v. Tudor Ice Co.*, 104 Mass. 239, 243, Gray, J., declared that "the single case in which an information has been sustained in an English court of chancery against a corporation for carrying on a business beyond its corporate powers is *Attorney-General v. Great Northern Railway Co.*, 1 Drewry & Smale, 154, in which Vice Chancellor Kindersley in 1860 restrained a railway company from trading in coal in large quantities upon the ground that there was danger that, if allowed to go on, it might get into its hands the coal trade of the whole district from or through which its rail-

way ran, and thus acquire a monopoly injurious to the public. That case is evidently the foundation of the dictum of Vice Chancellor Wood, two years later, in *Hare v. London & Northwestern Railway Co.*, 2 Johns. & Hem. 80, 111." Under the Pa. Act of June 14, 1836, § 2, allowing writs of *quo warranto* to be issued by courts of common pleas in case of forfeiture for misuser of the franchises of a corporation within the county, and the act of April 7, 1870, § 1, extending the jurisdiction of the court of Common Pleas of Dauphin county to all suits by the commonwealth throughout the state, the latter court has jurisdiction of a writ of *quo warranto* against a water company of Bradford county for furnishing impure and unwholesome water. The act of 1874, giving a remedy to any citizen to whom pure water is not furnished, does not affect the remedies of the commonwealth. *Commonwealth v. Towanda Water Works* (Pa. 1888), 15 Atl. Rep. 440, 22 W. N. Cas. 439; *Beach on Railways*, § 592.

<sup>83</sup> *Attorney-General v. Tudor Ice Co.*, 104 Mass. 239, 6 Am. Rep. 227; *People v. Equity, etc. Co.*, 141 N. Y. 232; *Attorney-General v. Stevens*, 1 N. J. Eq. 369, 22 Am. Dec. 526; *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 371; *State v. Merchants' Ins. etc. Co.*, Humph. (Tenn.) 235.

<sup>84</sup> *Morrow v. Edwards*, 20 D. C. 475; *Attorney-General v. Stevens*,

But after the decree of forfeiture at law, or by the legislature, a court of equity may protect creditors, and stockholders' rights, by appointment of a receiver to administer upon the corporate assets.<sup>85</sup> And the remedy is alone at law, and by *quo warranto*, to restrain a corporation from exercise of corporate power, except in case of nuisance or threatened injury to the public;<sup>86</sup> or, in case of *ultra vires* acts injurious to a stockholder, a court of equity may enjoin the corporation and its officers and stockholders from doing any such *ultra vires* or fraudulent acts;<sup>87</sup> and may enjoin corporate acts constituting a public nuisance.<sup>88</sup> There are but two kinds of cases in which an information in equity in the name of the attorney-general should be sustained. "The one is of public nuisances which affect or endanger the public safety or convenience, and require immediate judicial interposition, like obstructions of highways or navigable waters."<sup>89</sup> The other is of trusts for charitable purposes, where the beneficiaries are so numerous and indefinite that the breach of trust can not be effectively redressed, except by suit in behalf of the public.<sup>90</sup> If there are any other cases to

<sup>1</sup> N. J. Eq. 369, 22 Am. Dec. 526; Clarke v. Brooklyn Bank, 1 Edw. Ch. (N. Y.) 361.

<sup>85</sup> Western N. C. Co. v. Rollins, 82 N. C. 523; Weatherly v. Capital City Water Co., 115 Ala. 156; Miner v. Belle Isle Ice Co., 93 Mich. 97; O'Connor v. Knoxville Hotel Co., 93 Tenn. 708; Central Ry. Co. v. Collins, 40 Ga. 582.

<sup>86</sup> Attorney-General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371; Attorney-General v. Tudor Ice Co., 104 Mass. 239, 6 Am. Rep. 227; Attorney-General v. Jamaica Pond Corp., 113 Mass. 361; Attorney-General v. Cohoes Co., 6 Paige (N. Y.), 133, 29 Am. Dec. 755; Central Bridge Co. v. Lowell, 4 Gray, 474.

<sup>87</sup> Coleman v. Eastern Counties Ry. Co., 10 Beav. 1; Byrne v. Schuyler, etc. Co., 65 Conn. 336; Central Ry. Co. v. Collins, 40 Ga. 582.

<sup>88</sup> Central Bridge Co. v. Lowell, 4 Gray, 474. And see *supra*, note 86.

<sup>89</sup> Cf. District Attorney v. Lynn & Boston R. Co., 16 Gray, 242; Attorney-General v. Cambridge, 16

Gray, 247; Attorney-General v. Boston Wharf Co., 12 Gray, 563; Rowe v. Granite Bridge Co., 21 Pick. 344, 347.

<sup>90</sup> Cf. County Attorney v. May, 5 Cush. 336; Jackson v. Phillips, 14 Allen, 539, 579; Attorney-General v. Garrison, 101 Mass. 223; Mass. Gen. Stat. ch. 14, § 20; Attorney-General v. Railroad Cos., 35 Wis. 425; Spooner v. McConnell, 1 McLean, 337; Attorney-General v. Hudson Riv. R. Co., 1 Stockton, 526; Attorney-General v. New Jersey R. Co., 2 Green (N. J.), Ch. 136; Buck Mountain Coal Co. v. Lehigh Coal & Nav. Co., 50 Pa. St. 91; Sparhawk v. Union, etc. R. Co., 54 Pa. St. 401; Biglow v. Hartford Bridge Co., 14 Conn. 578; State v. New Haven, etc. Co., 45 Conn. 331. A court of equity has no jurisdiction to restrain a navigation company from collecting tolls on the streams to which its charter refers, on the ground that it had failed to improve the streams as the charter prescribed, or to keep them in order; the only mode of proceeding against a corporation in such

which this form of remedy is appropriate, that of a private trading corporation, whose proceedings are not shown to have injured or endangered any public or private rights,—and are objected to solely upon the ground that they are not authorized by its act of incorporation and are therefore against public policy,—is not one of them.”<sup>91</sup>

**§ 1302. Actual or prospective injury to the public to be proven.**—Something more than non-user, accidental negligence, excess of corporate powers, or mistake in the mode of exercising an acknowledged power, is requisite to constitute a ground for forfeiture. There must be some wilful or improper act or neglect, such as to work, or threaten, a substantial injury to the public.<sup>92</sup> That the grantees of a corporate charter shall continue to use the franchise during the period for which it was granted, is generally

a case being by *quo warranto* at the suit of the state. *Pixley v. Roanoke Nav. Co.*, 75 Va. 320.

<sup>91</sup> *Attorney-General v. Tudor Ice Co.* (1870), 104 Mass. 239, 244, per Gray, J.

<sup>92</sup> *State v. Minnesota Thrasher Manuf. Co.* (1889), 40 Minn. 213; *State v. Merchants' Ins. etc. Co.*, 8 Humph. 235; *Harris v. Mississippi Valley, etc. R. Co.*, 51 Miss. 602; *Commonwealth v. Franklin Ins. Co.*, 115 Mass. 278; *Eastern Archipelago Co. v. Queen*, 2 E. & B. (75 E. C. L. R.) 869; *People v. Bristol & Rensselaerville R. Co.*, 23 Wend. 222; *Chesapeake & Ohio Canal Co. v. Baltimore & Ohio R. Co.* (1832), 4 G. & J. 1, where non-user of the franchise of eminent domain to condemn lands for the construction of canals, during a period of some forty years, was held not to be under the circumstances a proper ground of forfeiting the franchise, the court saying, “Nor is it every non-user, that will furnish a sufficient ground for a judgment of forfeiture;” *Board of Commissioners Fred. Female Seminary v. State*, 9 Gill, 379; *State v. Commercial Bank*, 28 Pa. St. 383. See “*Forfeiture of Corporate Franchises*” (1866), 5 Am. L. Reg. N.

S. 577, 581, 585. Thus the mere fact that the trustees of a mutual benefit association illegally voted themselves back pay and issued unauthorized certificates of membership, was not held sufficient ground for ousting the association of its franchise. *State v. People's Mut. Benefit Assn.* (1885), 42 Ohio St. 579, Follett, J., dissenting. So where a corporation is charged with taking up with its own stock the stock and indebtedness of an insolvent company at fictitious values, and with the unlawful purchase and retirement of part of its own stock, as the unauthorized acts affect merely stockholders and creditors who have an adequate legal remedy the state will not interfere. *State v. Minnesota Thrasher Manuf. Co.* (1889), 40 Minn. 213. In another case a petition for the dissolution of a corporation stated that one-half of the shares of the corporate stock was owned by the petitioners; that the parties differed concerning the management of the corporate affairs; and that the petitioners were convinced that if the methods and plans advocated by other parties in relation to the management of the corporation were carried out, the result

an implied condition of the charter.<sup>93</sup> It is forfeitable for wilful non-user, but only such non-user as affects matters which are of the essence of the charter contract between the State and the corporation,<sup>94</sup> and when such acts of non-user amount to wilful and repeated violation of that contract.<sup>95</sup> In the case of *quasi-public* corporations, especially, the charter is forfeitable for such non-user when it works or threatens injury or prejudice to the public, by reason of non-performance of duties toward it, when they are involved in carrying out the purposes for which the corporation was organized. And its charter is forfeitable for non-user, whenever the corporation renders itself unable to perform such corporate obligation to the public,<sup>96</sup> or an entire non-user of its powers and privileges for such a time as to create a presumption of surrender.<sup>97</sup> Financial inability of the corporation to perform public duties, is no defense to proceedings for forfeiture of its charter for non-performance of such duties.<sup>98</sup> The transgression must not be merely formal or incidental, but material and serious, and such as to harm or menace the public welfare. For the State does not concern itself with the quarrels of private litigants. It furnishes for them sufficient courts and remedies, but intervenes as a party only where some public interest requires its action. Corporations may and often do exceed their authority

would be its financial ruin. What the methods and plans were the petition did not state; neither was it shown that, on account of disagreement, or for any other reason, a dissolution of the corporation would be beneficial to the interests of the corporation. It was held that the petition was insufficient. *In re Pyrolusite*

Manganese Co., 29 Hun, 429; 2 Waterman on Corporation, 899.

<sup>93</sup> People v. Plainfield, etc. Co., 105 Mich. 9; Darnell v. State, 48 Ark. 321, 3 S. W. 365; State v. Minn. etc. Co., 36 Minn. 246; State v. New Orleans, etc. Co., 2 Rob. (L. A.) 529.

<sup>94</sup> State v. Council Bluffs, etc. Co., 11 Neb. 354, 9 N. W. 563; State v. Farmers' College, 32 Ohio St. 487; Harris v. Miss. Valley, etc. Co., 51 Miss. 602,

<sup>95</sup> State v. Pawtucket Turnpike Corp., 8 R. I. 182; State v. So-

ciete Republicaine, 9 Mo. App. 114.

<sup>96</sup> Illinois, etc. Univ. v. People, 166 Ill. 171; Henderson Loan, etc. Assn. v. People, 163 Ill. 196; People v. Plainfield, etc. Co., 105 Mich. 9; State v. Cannon, etc. Assn., 67 Minn. 14; State v. Pawtucket Turnpike Corp., 8 R. I. 182, 94 Am. Dec. 123.

<sup>97</sup> Brandon Iron Co. v. Gleason, 24 Vt. 288; People v. Northern R. Co., 53 Barb. 98. Upon the question of user of franchise under a charter of incorporation, it was held error to charge that the acceptance of a deed, and subsequently of a deed of confirmation, from the grantor's devisee, was not enough to prove user; and that the question should have been left to the jury. Augusta Manuf. Co. v. Vertrees (1882), 4 Lea, 75.

<sup>98</sup> People v. Plainfield, etc. Co., 105 Mich. 9.

where only private rights are affected. When these are adjusted all mischief ends and all harm is averted. But where the transgression has a wider scope, and threatens the welfare of the people, they may summon the offender to answer for the abuse of its franchise, or the violation of its corporate duty.<sup>99</sup> The courts act, however, with extreme caution in proceedings which have for their object the forfeiture of corporate franchises.<sup>1</sup> To effect the forfeiture of a charter, however, the State is not required to prove an actual injury to the public, as a result of the company's wrongful acts. It is sufficient if their *tendency* be injurious.<sup>2</sup> But no mere intention of a corporation to violate its duty, is a cause of forfeiture of its charter,<sup>3</sup> although it may be ground for an injunction.<sup>4</sup>

<sup>99</sup> *People v. North River Sugar Refining Co.* (1890), 121 N. Y. 582, 18 Am. St. Rep. 843, 2 Smith Cas. 943, 8 Ry. & Corp. L. J. 22, per Finch, J., who continued, "The Code of Civil Procedure authorizes an action for that purpose when the corporation has 'violated any provision of law whereby it has forfeited its charter or become liable to be dissolved by the abuse of its powers.' In *Thompson v. The People*, 23 Wend. 583, the ground of forfeiture was tersely described as some 'misdemeanor in the trust injurious to the public,' and as recently as the case of *Leslie v. Lorillard*, 110 N. Y. 531, we said, 'in the granting of charters the legislature is presumed to have had in view the public interest; and public policy is concerned in the restriction of corporations within chartered limits; and a departure therefrom is only deemed excusable when it cannot result in prejudice to the public.' *People v. Boggart*, 45 Cal. 73; *Commonwealth v. Arrisson*, 15 Serg. & R. (Pa.) 127, 16 Am. Dec. 531; *State v. Minneosta, etc. Co.*, 40 Minn. 213, 3 L. R. R. 510; *Harris v. Miss. Valley, etc. Co.*, 51 Miss. 602; *State v. Portland, etc. Oil Co.*, 153 Ind. 483, 74 Am. St. Rep. 314, 53 L. R. A. 413; *State v. Oberlin, etc. Assn.*, 35 Ohio St. 528.

<sup>1</sup> 2 Waterman on Corporations, 903; *Harris v. Mississippi Valley, etc. R. Co.*, 51 Miss. 602; *State v. Commercial Bank*, 28 Pa. St. 383; *Commonwealth v. Allegheny Bridge Co.*, 20 Pa. St. 185; *People v. Jackson, etc. P. R. Co.*, 9 Mich. 285. The right to improve and extend the navigation of a river is a franchise, the manner of doing it being the mode of exercising the franchise. If there are various alternative modes authorized by the charter, subject each of them to be changed at the will of the corporation, no experimental trial of one of the modes will work a forfeiture of the right to resort to the others. So long as the charter remains in force the very employment of some one of the authorized modes of improvement is a practical exercise of the franchise. *Chesapeake & Ohio Canal Co. v. Baltimore, etc. R. Co.*, 4 Gill & Johns. 1, 106, 107 (1832); 2 Waterman on Corporations, 899.

<sup>2</sup> *Commercial Bank v. State*, 6 Sm. & M. 599.

<sup>3</sup> *Commonwealth v. Pittsburgh, etc. R. Co.*, 58 Pa. St. 26; *State v. Martin*, 51 Kan. 462; *Clancey v. Onondaga, etc. Co.*, 62 Barb. (N. Y.) 395; *State v. Kingan*, 51 Ind. 142; *Att'y-Gen. v. Superior, etc. Co.*, 93 Wis. 604; *State v. Beck*, 81 Ind. 500.

<sup>4</sup> Note to *Ottaquechee Woolen*

§ 1303. *Quo warranto* proceedings to test de jure existence of the corporation.—Corporations are creatures of the law, and when they fail to perform duties which they were incorporated to perform, and in which the public has an interest, or do acts which are not authorized, or are forbidden them to do, the State may forfeit their franchises and dissolve them by an information in the nature of a *quo warranto*.<sup>5</sup> For the grant of corporate franchises is always subject to the implied condition that they will not be abused.<sup>6</sup> In the earliest times the writ of *scire facias* was used by the government as a mode to ascertain and enforce the forfeiture of a corporate charter, in cases where there was a legal existing body, capable of acting, but which had abused its power. It would not lie in cases of mere *de facto* corporations. And it was necessary that the government be a party to the suit, for the judgment was, that the parties be ousted and the franchises seized into the hands of the government.<sup>7</sup> Later on, the writ of *quo warranto* was invented, and issued to bring the defendant before the court to show by what authority he claimed an office or franchise, and was applicable alike to cases where the defendant never had a right, or where, having a right or franchise, he had forfeited it by neglect or abuse.<sup>8</sup> An information in the nature of *quo warranto*, which has succeeded the writ of that name, was originally in form a criminal proceeding, to punish the usurpation of the franchise by a fine, as well as to seize the franchise. This information has in process of time become, in substance, a civil proceeding, to try the mere right to the franchise or office.<sup>9</sup> There is now no other remedy, and an application made by the attorney-general to a court of chancery for an injunction to restrain a company from usurping the franchise of banking, has been refused because there was a complete and adequate remedy at law by an information in the nature of a *quo warranto*.<sup>10</sup> The principle of forfeiture is, that the franchise is a trust, and the terms of the

Co. v. Newton (Vt. 1885), by H. C. Black, 21 Cent. L. J. 432, 435; Central Ry. Co. v. Collins, 40 Ga. 582; Byrne v. Schuyler, etc. Co., 65 Conn. 336, 28 L. R. A. 304; People v. Equity, etc. Co., 141 N. Y. 232; Att'y-Gen. v. Metropolitan Ry. Co., 125 Mass. 515, 28 Am. Rep. 264.

<sup>5</sup> People v. Insurance Co., 15 Johns. 358; People v. Railroad Co., 53 Cal. 694; Golden Rule v. People, 118 Ill. 492; People v. Dashaway

Assn. (1890), 84 Cal. 114, 8 Ry. & Corp. L. J. 236.

<sup>6</sup> Insurance Co. v. Needles, 113 U. S. 574; People v. Dashaway Assn. (1890), 84 Cal. 114, 8 Ry. & Corp. L. J. 236.

<sup>7</sup> 2 Kent's Commentaries, 213.

<sup>8</sup> 3 Blackstone's Commentaries, 262, 263.

<sup>9</sup> Angell & Ames, Corp., § 756.

<sup>10</sup> People v. Insurance Co., 15 Johns. 358.

charter are conditions of the trust; and if any one of the conditions of the trust be violated, it will work a forfeiture of the charter. Cases of forfeiture are said to be divided into two great classes: (1) Cases of perversion, as where a corporation does an act inconsistent with the nature and destructive of the ends and purposes of the grant. In these cases, unless the perversion is such as to amount to an injury to the public which is interested in the franchise, it will not work a forfeiture. (2) Cases of usurpation, as where a corporation exercises a power which it has no right to exercise. In this last case the question of forfeiture is not dependent, as in the former, upon any interest or injury to the public.<sup>11</sup> An information in the nature of *quo warranto* to forfeit the charter of a corporation for perversion of its franchise, may be brought by the people where the constitution of a State reserves the writ of *quo warranto*.<sup>12</sup> The action is properly brought in the name of the people, and against the corporations in their corporate names, in cases where they had, as corporations, usurped franchises not granted by their charters.<sup>13</sup> And the corporation must be made a party in an action to restrain the usurpation of corporate franchises.<sup>14</sup> For, in its relation to the government, and when the acts or neglects of a corporation, in violation of its charter or of the general law, become the subject of public inquiry,—with a view to the forfeiture of its charter,—the wilful acts and neglects of its officers are regarded as the acts and neglects of the corporation, and render the corporation liable to a judgment or decree of dissolution.<sup>15</sup> This reasoning proceeds upon the theory that the corporation is cognizant of, and approves of the acts of, its agents; and where it is made to appear that the agent has departed from his duties, as prescribed by the corporation, or violated his instructions in the performance of the acts complained of and relied upon as basis for forfeiture,—no such forfeiture will be declared.<sup>16</sup> It was a peculiarity both of the writ and of the information, that the ordinary rule of pleading was reversed, and the defendant was required to show its right, or the judgment went

<sup>11</sup> People v. Dashaway Assn., 84 Cal. 114 (1890), 8 Ry. & Corp. L. J. 236.

<sup>12</sup> People v. Dashaway Assn., 84 Cal. 114 (1890), 8 Ry. & Corp. L. J. 236.

<sup>13</sup> People v. Bank, 6 Cow. 196, 211, 217; People v. Trustees, 5 Wend. 211.

<sup>14</sup> People v. Flint, 64 Cal. 49.

<sup>15</sup> Angell & Ames, Corp., § 310; Life Ins. Co. v. Mechanics' Ins. Co., 7 Wend. 35; Bank Commissioners v. Bank of Buffalo, 6 Paige, 497; Ward v. Insurance Co., 7 Paige, 294.

<sup>16</sup> State v. Commercial Bank, 6 Sm. & M. 237.

against it. The practice has, however, become quite general in this country for the information to set forth the facts relied upon to show the intrusion, misuser, or non-user complained of. In information of *quo warranto* there were two forms of judgment. When against an officer or individual the judgment was ouster; when against a corporation by its corporate name the judgment was ouster and seizure. In the first case, there being no franchise forfeited, there is none to seize; in the second case there is; consequently the franchise is seized.<sup>17</sup> But there may be a judgment of ouster of a particular franchise and not of the whole charter.<sup>18</sup> The forfeiture of a charter of a corporation can not be maintained on an averment in the nature of a *quo warranto* that the corporation was formed to "promote the cause of temperance," and that it has abused its trust and misappropriated its funds, as it can not be said that the perversion of the fund, from so vague an object as "temperance," is a public injury.<sup>19</sup> In the absence of any action against the shareholders of a corporation on the part of the State for a want of legal organization by them, no action on this account will lie in behalf of parties dealing with the corporation, if the shareholders appear to have acted in the *bona fide* belief that they were duly incorporated.<sup>20</sup> The civil action of *quo warranto* may be brought against a foreign corporation, which assumes to transact in Ohio the business of life insurance on the assessment plan, without complying with the conditions imposed by law on the transaction of that business, for the purpose of ousting it from the exercise of its franchises in the State.<sup>21</sup> And a proceeding by a State, to forfeit a franchise, can not be removed to the federal courts on the ground that it impairs the obligations of a contract; the prohibition of the constitution being that "no State shall pass any law" impairing the obligation of contracts.<sup>22</sup> Neither does a proceeding to exclude a bridge company from the use of a franchise to operate railroad tracks in a public street—raise a federal question, although the tracks lead to its bridge, built under acts of Congress authorizing the construction of a railroad bridge over the Ohio river (and de-

<sup>17</sup> 2 Kent's Commentaries. 312, and note.

<sup>21</sup> State v. Western, etc. Soc., 47 Ohio St. 157 (1890), 24 N. E. Rep. 392.

<sup>18</sup> People v. Railroad Co., 15 Wend. 113.

<sup>22</sup> Commonwealth v. Louisville,

<sup>19</sup> People v. Dashaway Assn., 84 Cal. 114 (1890).

etc. Co. (1890), 42 Fed. Rep. 241, 8 Ry. & Corp. L. J. 106. Cf. § 53,

<sup>20</sup> Gartside Coal Co. v. Maxwell, 22 Fed. Rep. 197.

*supra*.

claring that it shall be a lawful structure, and shall be recognized and known as a post-route), as those acts do not attempt to give the right to the use of the street as an approach.<sup>23</sup>

**§ 1304. Quo warranto procedure to forfeit the charter.**—In *quo warranto* proceedings to forfeit the charter, it is in the court's discretion whether to oust the corporation only from the exercise of a particular unauthorized power, or to forfeit the charter, altogether.<sup>24</sup> Without the consent of the court, the State can not file *quo warranto* proceedings to forfeit the charter where a receiver is in possession of the property.<sup>25</sup> In such proceedings the court can not appoint a receiver, in the absence of authority of statute.<sup>26</sup> To authorize the proceeding, it must be shown that there is peril to some public interest.<sup>27</sup> The proceeding is the proper remedy in case of illegal incorporation.<sup>28</sup> It lies against a foreign corporation illegally doing business in the State.<sup>29</sup> At common law, it lies only for *ultra vires* acts affecting some granted franchises, and does not lie to remedy wrongs to stockholders or creditors.<sup>30</sup> The common law *quo warranto* information, as we have it today, is substantially as left by the changes and modifications made by the statute of 9 Anne, Chap. 20. The scope of the remedy furnished by it, is to forfeit the franchises of a corporation for misuser or non-user. The misuser must be such as to threaten a substantial injury to the public, or to defeat the fundamental purpose of the grant, and the evil must be one remediable in no other form of judicial proceeding. The distinction must be made between the franchise that cannot be exercised without express permission of the legislature, as, the franchise to be a corporation,—and powers which are not franchises, but are powers which are inherent in a corporation to carry on the particular business for which it is created,—engagement in any other business is *ultra vires*, and an abuse of the franchise to be a corporation, but it may be only such excess in exercise of power as

<sup>23</sup> Commonwealth v. Louisville, etc. Co. (1890), 42 Fed. Rep. 241,

8 Ry. & Corp. L. J. 106.

<sup>24</sup> State v. Old Town, etc., 85 Me. 17 (1892); State v. Portland, etc. Co. (1899), 153 Ind. 483, 53 L. R. A. 413; Commonwealth v. Sturtevant (1897), 182 Pa. St. 323.

<sup>25</sup> Wayne Pike Co. v. State, 134 Ind. 672 (1893).

<sup>26</sup> Commonwealth v. Order of Vesta (1893), 156 Pa. St. 531.

<sup>27</sup> People v. Ulster, etc. R. R. (1891), 128 N. Y. 240.

<sup>28</sup> People v. Montecito, etc. Co. (1893), 97 Cal. 276, 33 Am. St. Rep. 172; People v. Chicago Gas T. Co. (1889), 130 Ill. 268, 8 L. R. A. 497.

<sup>29</sup> State v. American, etc. Co. (Kan. 1902), 69 Pac. 563; State v. Somerby (1899), 42 Minn. 55.

<sup>30</sup> State v. Southern, etc. Assn. (Ala. 1902), 31 So. 375.

will justify interference by injunction, though it will not furnish ground for *quo warranto* proceedings to forfeit the charter. To constitute a misuser of the franchise to be a corporation such as to warrant its forfeiture, the *ultra vires* acts must be so substantial and continued as to amount to a clear violation of the condition upon which the franchise was granted, and so derange or destroy the business of the corporation that it no longer fulfills the end for which it was created. But in a case of excess of powers, it is only where some public mischief is done or threatened that the State, by the attorney-general, should interfere. If the *ultra vires* acts prejudice only stockholders or creditors, it is for them alone to complain.<sup>31</sup>

**§ 1305. Scire facias proceedings, in case of abuse of corporate powers.**—*Scire facias* will lie by or against a corporation, whenever it will lie against a natural person, in the absence of restriction by charter or statute. At common law it was the remedy against a corporation to enforce a forfeiture of its charter, for abuse of its powers.<sup>32</sup> The modern remedies used to correct the usurpation of corporate franchises, are by *scire facias*, where a corporation abuses its power, and by *quo warranto* information, where a corporation *de facto* assumes powers which do not belong to it.<sup>33</sup> The statutory remedy in Vermont, for forfeiting the franchise of a corporation, is by *scire facias* in the name of the State, the common law provision being by implication repealed.<sup>34</sup> Where a foreign insurance company, having received from the State auditor a certificate under the provisions of the law as to insurance companies, was alleged to be offending against the laws of the State by making more than one kind of insurance, it was decided that *quo warranto*, and not *certiorari*, was the proper manner of inquiring into such charges.<sup>35</sup> Courts do not favor

<sup>31</sup> *State v. Minnesota, etc. Co.* (1889), 40 Minn. 213, 3 L. R. A. 510.

<sup>32</sup> *Slee v. Bloom*, 5 Johns. Ch. (N. Y.) 366; *Washington, etc. Co. v. State*, 19 Md. 239; *Washington, etc. Co. v. Maryland*, 3 Wall. (U. S.) 210.

<sup>33</sup> *Commonwealth v. United States Bank*, 2 Ashm. 349.

<sup>34</sup> *Green v. St. Albans Trust Co.*, 57 Vt. 340; *Vt. Rev. Laws*, ch. 72, §§ 1327, 1331.

<sup>35</sup> *State v. Fidelity & Casualty*

Co. (1889), 77 Iowa, 648. The statutory provisions are as follows: By Code Iowa, § 3216, *certiorari* lies in cases where an inferior officer exercising judicial functions is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally, "when in the judgment of the superior court there is no other plain, speedy, and adequate remedy." Code, ch. 6, tit. 20, is designed especially to "test official and corporate rights." Section 3345 provides that a civil

this means of redressing the abuse of corporate powers, and will refuse to countenance it, where there is other ample remedy, or the abuse is doubtful.<sup>36</sup> Where the information is to be filed on the relation of some one, leave of the court must first be had. But where the proceedings are instituted by the attorney-general *ex officio* and without any relator, the information is filed as of course, without leave of the court.<sup>37</sup> It was the early practice of the courts to grant the application for leave to bring the information almost as a matter of course, but the growing frequency of the proceeding induced an examination into the merits of the applications, and led to the exercise of a discretion in the premises which gave rise to the now well-settled rule, that the granting of these applications, rests in the sound discretion of the court.<sup>38</sup> To entitle one to act as relator, he must have some interest in the office or franchise.<sup>39</sup> The mere interest of a private citizen is not enough to put a private corporation on its defense to the remedy in question.<sup>40</sup> Though for private and peculiar injury within its scope, it might lie at the relation of an individual; it would not be granted to dissolve a corporation.<sup>41</sup> Information in the nature of *quo warranto* to oust the defendants from acting as a corporation, and to test the fact of their incorporation, should be filed against the individuals; but if the object is to effect a dissolution of a corporation, or to oust it from some franchise which it is unlawfully exercising; then the information is correctly filed against the corporation.<sup>42</sup> Information in the nature of *quo warranto*, however, is essentially a civil proceeding, and the burden of proof is upon the complaining party to show that his adversary is illegally in possession of the office.<sup>43</sup> But if the proceeding against a corpo-

action may be brought in the name of the state, *inter alia*, "against any person acting as a corporation within this state, without being authorized by law;" also "against any corporation doing or omitting acts which amount to a forfeiture of their rights and privileges as a corporation, or exercising powers not conferred by law."

<sup>36</sup> State v. Commercial Bank, 10 Ohio, 535; People v. Hillsdale, etc. Co., 2 Johns. 190.

<sup>37</sup> Commonwealth v. Walter, 83 Pa. St. 105; State v. Vail, 53 Mo. 27; High on Extr. Rem., § 707.

<sup>38</sup> People v. Waite, 70 Ill. 25; Commonwealth v. Arrison, 15 Serg. & R. 133; People v. Sweeting, 2 Johns. 183; State v. Tehoe, 7 Rich. 246; State v. Tolan, 33 N. J. 195; State v. Centerville Bridge Co., 18 Ala. 678; State v. Fisher, 28 Vt. 714.

<sup>39</sup> State v. Vail, 53 Mo. 97, 109.

<sup>40</sup> State v. Paterson, etc. Co., Zab. 9.

<sup>41</sup> Murphy v. Farmers' Bank, 20 Pa. St. 415.

<sup>42</sup> People v. Rensselaer, etc. R. Co. (1836), 15 Wend. 113.

<sup>43</sup> State v. Kupferle (1869), 44 Mo. 154.

ration is founded on an alleged usurpation of power, and is instituted by the State, and not on the relation of a private person, the burden is on the defendant to disclaim or justify, and the State is not bound to make affirmative proof. In such case, the burden is upon the respondent to show title, and if the title relied upon in defense be incomplete, the State or "the people" as the case may be are entitled to judgment.<sup>44</sup> If a corporation is shown to have been once in existence, its continuance is presumed until the contrary is known.<sup>45</sup> Proceedings, of a board of *de facto* directors of a private corporation, are presumed to be regular until irregularity is shown; therefore, when acting under a by-law, they remove an officer, it will be presumed that they acted on sufficient grounds, until their action is impeached by proof.<sup>46</sup> Judgment of ouster is rendered against individuals for unlawfully assuming to be a corporation, or against a corporation to forfeit its corporate privileges.<sup>47</sup> It is conceded that a corporation may forfeit its charter or franchises for wilful misuser or non-user thereof.<sup>48</sup> For it is a tacit condition, annexed to the creation of every corporation, that it shall be subject to dissolution by forfeiture of its franchise for wilful misuser or non-user in regard to matters which go to the essence of the contract between it and the State. The procedure by the common law, to enforce a forfeiture of charter, because of abuse of its franchises, was formerly by *scire facias*, and it is still so in some States;<sup>49</sup> and where, without authority, attempt was made to exercise corporate powers, *quo warranto*

<sup>44</sup> People v. Utica Ins. Co., 15 Johns. 358; State v. Harris, 3 Ark. 570.

<sup>45</sup> People v. Manhattan Co., 9 Wend. 351, 378.

<sup>46</sup> State v. Kupferle (1869), 44 Mo. 154.

<sup>47</sup> People v. Rensselaer, etc. R. Co. (1836), 15 Wend. 113.

<sup>48</sup> Terrett v. Taylor, 9 Cranch. (U. S.) 43; Commonwealth v. Union Fire Ins. Co., 5 Mass. 230, 4 Am. Dec. 50; State v. Portland, etc. Oil Co., 153 Ind. 483, 53 L. R. A. 413, 74 Am. St. Rep. 314; New York, etc. Bridge Co. v. Smith, 148 N. Y. 540; People v. North River, etc. Co., 121 N. Y. 582, 9 L. R. A. 33, 18 Am. St. Rep. 843; Henderson Loan, etc. Assn. v. People, 163 Ill. 196; Illinois, etc. Univ. v. Peo-

ple, 166 Ill. 171; State v. Cannon, etc. Assn., 67 Minn. 14. And cases reported in Am. St. Rep. 179 *et seq.*; People v. Kingston, etc. Road Co., 23 Wend. 193, 35 Am. Dec. 551, and note; State v. Commercial Bank, 13 Sm. & M. 539, 53 Am. Dec. 106; Chesapeake & O. Canal Co. v. Baltimore & O. R. Co., 4 Gill & J. 122; People v. President, etc. Manhattan Co., 9 Wend. 351; Penobscot, etc. Co. v. Lamson, 16 Me. 224; Commonwealth v. Commercial Bank of Pa., 28 Pa. St. 383.

<sup>49</sup> Washington, etc. Co. v. Maryland, 3 Wall. (U. S.) 210; Washington, etc. v. State, 19 Md. 239; Slee v. Bloom, 5 Johns. Ch. (N. Y.) 366; Rex v. Pasmore, 3 Term. R. 199.

was the remedy, and *scire facias* would not lie. And so, whether there is a legal corporation that has forfeited its rights to continue, or a *de facto* corporation exercising unauthorized powers,<sup>50</sup> *quo warranto* is the common law remedy, and no statutory authority is necessary.<sup>51</sup> But this procedure can not be instituted by any private person; only the State can authorize the proceeding.<sup>52</sup> The attorney-general can act only *ex officio*, and by authority of the State. He can not act on behalf of any private person,<sup>53</sup> but the legislature may authorize a private person to institute such proceedings for forfeiture of a corporate charter.<sup>54</sup> No *mandamus* will lie, to compel the attorney-general to institute proceedings for forfeiture of a corporate charter.<sup>55</sup> The power of the courts in this respect is exclusive. The forfeiture of corporate charters is a penalty to be imposed by the judiciary alone.<sup>56</sup> The jurisdiction of a court of equity is limited to the protection of civil rights, where there is no adequate relief at law. It cannot restrain acts of a corporation simply on the ground that they are unauthorized, or prohibited by its charter. The remedy in such case, is by information in the nature of *quo warranto* to forfeit the charter, or to prevent the corporation from exercising the powers prohibited or unauthorized,<sup>57</sup> and a proceeding filed by

<sup>50</sup> State v. Equitable, etc. Assn., 142 Mo. 325; State v. Portland, etc. Oil Co., 153 Ind. 483, 74 Am. St. Rep. 314; People v. Phoenix Bank, 24 Wend. (N. Y.) 431, 35 Am. Dec. 634; People v. Kankakee R. I. Co., 103 Ill. 491.

<sup>51</sup> People v. Murray Hill Bank, 10 App. Div. (N. Y.) 328.

<sup>52</sup> Baltimore, etc. Ry. Co. v. Fifth Baptist Church, 137 U. S. 568.

<sup>53</sup> Commonwealth v. Union Fire, etc. Co., 5 Mass. 230, 4 Am. Dec. 50; People v. North Chicago Ry. Co., 38 Ill. 537; Rice v. National Bank, 126 Mass. 300; Heap v. Heap Mfg. Co., 97 Mich. 147; Hinchman v. Philadelphia, etc. Turnpike Road, 160 Pa. St. 150.

<sup>54</sup> Tuscaloosa, etc. Assn. v. State, 58 Ala. 54; State v. Consolidation Coal Co., 46 Md. 1.

<sup>55</sup> State v. Patterson, etc. Co., 21 N. J. Law, 9; State v. Att'y-Gen., 30 La. Ann. 954.

<sup>56</sup> Chesapeake & O. Canal Co. v. Baltimore & O. R. Co., 4 Gill & J. 122. A sentence of ouster or dissolution is "strictly a judicial act for some imputed delinquency ascertained by proceedings at law instituted for that purpose." Regents of the University of Maryland v. Williams, 9 Gill & J. 365, 31 Am. Dec. 72, 99. In State v. Noyes, 47 Me. 189, 43 Am. Dec. 119, the charter conferred certain powers upon the corporation, free from legislative interference, unless the company should in some way abuse the privileges granted, and it was held that whether there had been an abuse was a question for the courts and not for the legislature.

<sup>57</sup> Order of Foresters v. United Order of Foresters, 94 Wis. 234; Att'y-Gen. v. Tudor Ice Co., 104 Mass. 239, 6 Am. Rep. 227; Att'y-Gen. v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371; State v. Ober-

attorney-general on behalf of the State, is the proper mode of trying the issue.<sup>58</sup> Under no circumstances can the legislature presume to declare a forfeiture,<sup>59</sup> for that is a judicial function. The legislative power to dissolve a corporation is exercised by an act of repeal of the charter.<sup>60</sup> Such a usurpation of judicial powers would be hostile to one of the fundamental principles of the American system—by which the legislative, executive and judicial departments of government are required to be forever separate, and would be a denial of due process of law.<sup>61</sup> For “in these cases there are necessarily adverse parties; the questions are necessarily judicial; and over them the court possesses jurisdiction at the common law; and it is presumable that legislative acts of this character must have been adopted carelessly, and without due consideration of the proper boundaries which mark the separation of legislative from judicial duties.”<sup>62</sup> It follows, as a matter of course, that the legislature can not strengthen an enactment of forfeiture, by reciting therein facts which would constitute a ground for a judicial declaration of forfeiture.<sup>63</sup> Chancellor Kent lays down two modes of proceeding

lin, etc. Assn., 35 Ohio St. 258; People v. North River, etc. Co., 121 N. Y. 582, 9 L. R. A. 33, 18 Am. St. Rep. 843; People v. Utica Ins. Co., 13 Johns. (N. Y.) 358, 8 Am. Dec. 243; People v. River, etc. Ry. Co., 12 Mich. 389, 86 Am. Dec. 64; Att'y-Gen. v. City of Salem, 103 Mass. 138.

<sup>58</sup> Darnell v. State (1887), 48 Ark. 321; State v. Real Estate Bank (1843), 5 Ark. 595; Chicago Life Ins. Co. v. Needles, 113 U. S. 574, per Harlan, J.; State v. Minnesota Central Ry. Co. (1887), 36 Minn. 246; Terrett v. Taylor, 9 Cranch, 51; People v. President, etc. of the Manhattan Co. (1832), 9 Wend. 361.

<sup>59</sup> Allen v. Buchanan (1873), 9 Phila. 283; State v. Real Estate Bank, 5 Ark. 595, 41 Am. Dec. 109. Cf. Regents of the University of Maryland v. Williams, 9 Gill & J. 365, 31 Am. Dec. 72.

<sup>60</sup> Greenwood v. Union Freight Ry. Co., 105 U. S. 13.

<sup>61</sup> Regents of the University of

Maryland v. Williams, 9 Gill & J. 365; Allen v. Buchanan (1873), 9 Phila. 283; State v. Noyes, 47 Me. 189. “The legislature, executive, and judiciary are all creatures of the constitution, each confined in its action to the circumscribed sphere assigned to it, and cannot rightfully exercise any power which is repugnant to that instrument, or not within their respective sphere of action. . . . The legislature cannot usurp the powers confided to either of the other departments without violating the declaration in the bill of rights that they shall be forever separate and distinct from each other, which would be a subversion of the principles that lie at the foundation of the government.” Regents of the University of Maryland v. Williams, 9 Gill & J. 365, 31 Am. Dec. 72, 97.

<sup>62</sup> Cooley's Constitutional Limitations, 106.

<sup>63</sup> State v. Adams, 44 Mo. 570. “An act declaring a forfeiture, if

to ascertain and enforce the forfeiture of a charter for default or abuse of power. The one is by *scire facias*; and that process is proper where there is a legal existing body, capable of acting, but which has abused its power. The other mode is by information in the nature of a *quo warranto*, which is in form a criminal, and in its nature a civil remedy; and this is the proper mode of proceeding against persons who have assumed to act in a corporate capacity, but who, by reason of some defect in their organization, can not legally exercise their powers, having a mere *de facto* corporate existence.<sup>64</sup> But an information in the nature of *quo warranto* is now regarded not only as the appropriate means of testing the right to exercise corporate franchises, but also as the proper remedy for the abuse thereof.<sup>65</sup> The ancient civil writ of *quo warranto* has long since become obsolete in England, and is now wholly superseded in that country, and in most of the States of the American union, by a criminal information in the nature of a *quo warranto*. The form and substance of the judgment, so far as respects the seizure of franchises, is the same, whether the proceedings be civil or criminal, being that of ouster or seizure of the franchises into the hands of the State. The pleadings also are

beyond legislative authority, cannot be strengthened by reciting facts which might judicially work a forfeiture, unless those facts have been judicially passed upon. Any act may recite a judgment of forfeiture as a proper foundation for any legislation warranted by such judgment; but the question of forfeiture upon condition broken is strictly judicial, and the legislature cannot constitutionally know either that the facts exist, or their legal effect."

2 Waterman on Corporations, 914.

<sup>64</sup> Kent's Commentaries, 313; Regents of University of Maryland v. Williams, 9 Gill & J. 365; Ames v. Kansas, 111 U. S. 449; State v. Merchants' Ins. Co., 8 Humph. 235; People v. Utica Ins. Co., 15 Johns. 378, 8 Am. Dec. 249; State v. St. Paul, etc. R. Co., 35 Minn. 222; Baker v. Backus, 32 Ill. 79, 110; King v. Passmore, 3 Term Rep. 132.

<sup>65</sup> Terrett v. Taylor, 9 Cranch,

43. See note to Folger v. Columbian Ins. Co., 96 Am. Dec. 747, 757, and authorities there cited; Parish of Bellport v. Tooker, 29 Barb. 256, 21 N. Y. 267; People v. Kingston Turnpike Co., 23 Wend. 193; State v. Real Estate Bank, 5 Ark. 595, which was a proceeding by *quo warranto* for the purpose of seizing into the hands of the state the franchises of the defendant bank, which had suspended specie payment, had become insolvent, assigned its assets and ceased to exercise its franchises; and the court said: "The first question to be determined is, is the ancient writ of *quo warranto* a proper remedy in this cause? That it is so we have no doubt." Commonwealth v. Commercial Bank, 28 Pa. St. 383; State v. Milwaukee, etc. R. Co., 45 Wis. 579; State v. Bradford, 32 Vt. 50; Reed v. Cumberland, etc. Canal Co., 65 Me. 182; People v. Hudson Bank, 6 Cow. 217. In Vermont it is held

very similar,<sup>66</sup> except where some statutory remedy has been substituted, though in some states the former is still the remedy followed in cases of mere abuse of corporate powers.<sup>67</sup> For mis-user or non-user, or failure to perform a condition subsequent, an information in the nature of *quo warranto*, by the attorney-general, on behalf of the State to forfeit the charter, is a common-law remedy, and may be brought in any case of ground for forfeiture.<sup>68</sup>

that the proper method of obtaining an adjudication of forfeiture of a corporate franchise is by *scire facias* in the name of the state, as provided by Vt. Rev. Laws, ch. 72, §§ 1327, 1331; and that this method, by implication, repeals the common law. Green v. St. Albans Trust Co. (1885), 57 Vt. 340.

<sup>66</sup> State v. Real Estate Bank, 5 Ark. 595, 598 (1854), per Lacy, J.

<sup>67</sup> Washington, etc. Co. v. Maryland, 3 Wall. (U. S.) 210; Washington, etc. Co. v. State, 19 Md. 239; Slee v. Bloom, 5 Johns. Ch. (N. Y.) 366; Rex v. Pasmore, 3 Term R. 199.

<sup>68</sup> State v. So. Pac. Ry. Co., 24 Tex. 80.

## CHAPTER LV.

### DISSOLUTION OF CORPORATION.

§ 1306. Causes of dissolution. How it is brought about.	§ 1317. Insolvency of the corporation.
1307. Non-performance of conditions.	1318. Statutory grounds and provisions for dissolution.
1308. Dissolution <i>ipso facto</i> . Conditions subsequent.	1319. Effect of dissolution.
1309. Repeal. Legislative power to annul the charter.	1320. Effect upon judgments. Set-off, statutes of limitation.
1310. Voluntary surrender of the charter.	1321. Effect upon attachment for debt. Bankruptcy. Transfers of stock. Right of action for torts.
1311. Expiration of term of corporate existence.	1322. Effect upon debts. Franchises. Choses in action.
1312. Dissolution by a court of equity. Judgment of sequestration.	1323. Effect upon contracts.
1313. Dissolution at instance of shareholders.	1324. Receivers for dissolved corporations.
1314. Non-user and other grounds for dissolution.	1325. Enforcement of creditors' claims, after dissolution.
1315. Dormant corporations. Failure to hold meetings and elect officers. Death of all the members and stockholders.	1326. Distribution of assets among shareholders.
1316. Possession of all the stock by one individual. "One-man" corporation.	1327. Reversion and escheat of property, to grantors and to the state.
	1328. Winding-up order.

#### References:

- Grounds for forfeiture. Section 1294.
- Non-performance of conditions. Section 1294.
- Dissolution by repeal of charter. Section 1300.
- Legislative control. Police-power of legislature. Section 1306.
- Jurisdiction and powers of courts of equity. Section 1312.
- Judgment of sequestration. Sections 1012, 1025.
- Grounds held insufficient to authorize forfeiture. Section 1294.
- Possession of all the stock by one individual. "One-man corporation." Sections 71a, 557, 937-941.
- Insolvency. Sections 1210-1211.
- Statutory grounds. Section 1294.
- Bankruptcy of the corporation. Sections 1210-1211.
- Receivers for dissolved corporation. Sections 1246-1261.

**§ 1306. Causes of dissolution. How it is brought about.—** The causes which bring about dissolution are, first, the commission of wrongful acts by the corporation, by misuse and abuse of its charter and franchises, wherefore they may be forfeited by decree of court.<sup>1</sup> The other causes of dissolution are: (a) non-performance of conditions in the charter, within the time prescribed; (b) repeal of the charter by legislative act; (c) voluntary surrender of the charter by the stockholders; and, (d) expiration of the term of corporate existence, provided in the charter. Consolidation generally dissolves the consolidating companies.<sup>2</sup> Breach of trust by a corporate officer will not, of itself occasion dissolution.<sup>3</sup> The death of all the stockholders will not effect a dissolution of the corporation, nor will ownership of all the stock by a single individual.<sup>4</sup> The sale or lease of the entire property, will not of itself effect corporate dissolution, where the corporation is prosperous.<sup>5</sup> Where the court has statutory power to dissolve any business corporation on application of a certain majority of the stockholders, and the corporation conveys all its property to another, and they unite in applying for and obtaining dissolution (the intent being to prevent the property from going into the hands of a receiver),—the judgment of dissolution will be set aside, and the corporation revived, in order to enforce payment of just demands against it, of which the receiver has been given no notice in the dissolution proceedings.<sup>6</sup> An appeal will not lie in the name of a corporation to set aside a default judgment, against a dissolved corporation. The judgment can be attacked only by one interested in setting it aside. Such a judgment is a nullity.<sup>7</sup> The dissolution, meant in the statute providing for dissolution by two-thirds of the stockholders, is dissolution in good faith, to terminate the business, and does not authorize dissolution of a going concern, without consent of all the stock-

<sup>1</sup> *Vide supra*, FORFEITURE OF CHARTER AND FRANCHISES, §§ 1292–1305.

<sup>2</sup> *Keokuk, etc. R. R. v. Missouri* (1894), 152 U. S. 301; *Vide supra*, §§ 1294, GROUNDS FOR FORFEITURE.

<sup>3</sup> *Tutwiler v. Tuscaloosa, etc. Co.* (1889), 89 Ala. 391, 7 So. 398.

<sup>4</sup> *Russell v. McLellan* (1833), 31 Mass. 63.

<sup>5</sup> *Parker v. Bethel Hotel Co.*, 96 Tenn. 252 (1896), 34 S. W. 209, 31

L. R. A. 706; *Harding v. American, etc. Co.* (1899), 182 Ill. 551, 74 Am. St. Rep. 189; *Treadwell v. United, etc. Co.* (1900), 47 N. Y. App. Div. 613; *People v. Ballard* (1892), 136 N. Y. 639.

<sup>6</sup> *Sullivan Co. v. Connecticut, etc. Co.* (1904), 57 Atl. 287, 76 Conn. 464.

<sup>7</sup> *Austin v. Columbia, etc. Co.*, 87 N. Y. S. 497 (1904).

holders,—where the purpose is to transfer the business to another corporation, to be formed for its continuance, thereby to deprive certain minority stockholders of their interest in the corporate business.<sup>8</sup>

**§ 1307. Non-performance of conditions.**—The charter sometimes provides that upon failure to do certain things, within a specified time, the corporate existence shall cease. The construction, which originated in New York, and was followed by some other States, is that upon non-compliance with such a condition the charter becomes *ipso facto* forfeited, without necessity for any judicial declaration of forfeiture.<sup>9</sup> The weight of authority disfavors this very harsh construction, and holds, on the contrary, that such a provision is not self-executing, but requires the judgment of a court declaring the forfeiture.<sup>10</sup> The strict constructionists hold that: when the language used shows that the legislature intended to make the continued existence of the corporation depend upon its compliance with a particular provision of the act,—in case of non-compliance, its rights are to be deemed forfeited and terminated, whether the corporation is organized under a general or special law.<sup>11</sup> In such a case the statute ex-

<sup>8</sup> *Theis v. Spokane Falls, etc. Co.* (Wash. 1904), 74 Pac. 1004.

<sup>9</sup> *Welsh v. Old Dominion, etc. Co.* (1890), 10 N. Y. Supp. 174; *Bybee v. Oregon, etc. R. R.*, 139 U. S. 633 (1891); *Underground R. R. v. City of New York*, 116 Fed. 952 (1902); *Putnam v. Ruch* (1893), 54 Fed. 216; *Bonaparte v. Baltimore, etc. R. R.* (1892), 75 Md. 340; *Sulphur Springs, etc. Ry. v. St. Louis, etc. Ry.* (1893), 2 Tex. Civ. App. 650; *Houston v. Houston, etc. Ry.* (1892), 84 Tex. 581, 19 S. W. 786; *Vide supra*, § 1294, NON-PERFORMANCE OF CONDITIONS.

<sup>10</sup> *Morrison v. Forman* (1898), 177 Ill. 427; *Olyphant, etc. Co. v. Borough of Olyphant* (1900), 196 Pa. 553; *Whitman v. Citizens' Bank* (1901), 110 Fed. 503; *Louisville, etc. R. R. v. Bowling Green Ry.* (Ky. 1900), 63 S. W. 4; *Dusenberry v. New York, etc. Co.*, 46 N. Y. App. Div. 267 (1899); *Dern v. Salt Lake, etc. R. R.* (1899), 19

Utah, 46; 56 Pac. 556; Utah, etc. *R. R. v. Utah, etc. Ry.* (1901), 110 Fed. 879; *Boyd v. Redd* (1897), 120 N. C. 335, 27 S. E. 35, 58 Am. St. Rep. 792; *Galveston, etc. Ry. v. State* (1891), 81 Tex. 572, 17 S. W. 67; *State v. Spartanburg, etc. R. R.* (1897), 51 S. C. 129, 28 S. E. 145; *Mylrea v. Superior, etc. Ry.* (Wis. 1896), 67 N. W. 1138.

<sup>11</sup> *Brooklyn Steam Transit Co. v. Brooklyn*, 78 N. Y. 524; *In re Brooklyn, W. & N. R. Co.*, 72 N. Y. 245. In *People v. National Sav. Bank* (Ill. 1887), 11 N. E. Rep. 170, it was held that where an act of the legislature incorporating a banking company, passed March 20, 1869, provides that certain persons, etc., "are hereby incorporated," etc.; that the capital stock "shall be \$50,000," etc.; that, "before said corporation shall commence business, the stockholders shall pay the several amounts subscribed in full;" and that the "act shall be void, unless said cor-

ecutes itself. The non-existence of the corporation, in case of such *ipso facto* forfeiture, may be alleged in, opposition to an application by it to appropriate land under the law authorizing the taking of private property for public use.<sup>12</sup>

**§ 1308. Dissolution *ipso facto*. Conditions subsequent.**—Unless otherwise clearly shown to be the legislative intent, the corporation is not *ipso facto* dissolved upon the non-performance of a condition subsequent, or of an act of non-user or misuser which only furnishes a cause for forfeiture of the franchise. Until judicial decree of forfeiture, the franchise continues to exist.<sup>13</sup> For example, it was held that the failure to complete a railroad, under the provisions of the company's charter,—to the effect that the powers, rights, privileges and immunities granted thereby, cease, determine and be void, unless the company shall complete the road within three years,—is merely a cause of forfeiture, and not an express limitation of the existence of the corporation, and does not *ipso facto* dissolve the corporation.<sup>14</sup> In another case, where the statute required a turnpike company to make an annual report to the legislature “under forfeiture of the privileges of the act in future,” the court said: “The meaning of this is that the forfeiture shall be proved in the regular legal manner. Upon the institution and prosecution of proceedings in the established course, such neglect of this duty shall be cause of forfeiture.”<sup>15</sup> And where by statute the liability of stockholders to creditors may be enforced, only on dissolution of the corporation, it is held that dissolution occurs *ipso facto*, where there are no corporate

poration shall organize and proceed to business within two years after” its passage—the fact that, until November 24, 1885, only \$10,000 had been subscribed and paid in, renders the act void, and the charter forfeited. The Ind. Rev. St. 1881, § 3641, providing that gravel-road companies shall cease to be bodies corporate “if, within two years from the time of filing a copy of its articles of association with the county recorder, it shall not have commenced the construction of its road, and . . . if within four years from such time such road shall not be completed,” was held

not to apply to a company formed to own a road previously constructed. State v. St. Paul & Morrison Turnpike Co., 92 Ind. 42.

<sup>12</sup> *In re Brooklyn, W. & N. R. Co.*, 72 N. Y. 245.

<sup>13</sup> Elliott on Private Corp., § 94; Detroit v. Plank Road Co., 43 Mich. 140; State v. Atchison, etc. Co., 24 Neb. 143, 8 Am. St. Rep. 164; Atchison, etc. Ry. Co. v. Nave, 38 Kan. 744, 17 Pac. 587, 5 Am. St. Rep. 803.

<sup>14</sup> State v. Spartanburg, etc. Ry. Co., 51 S. C. 129, 28 S. E. 145.

<sup>15</sup> State v. Turnpike, 15 N. H. 162.

assets,<sup>16</sup> or upon insolvency of the corporation.<sup>17</sup> The charter or statute may so limit the corporate franchise, that the happening of a prescribed event shall be cause for the termination of the charter; and when the period so arrives, the corporation is, *ipso facto* dissolved, as, upon the lapse of the period of corporate existence. But when the continuance of the corporation, beyond a fixed time, is made to depend upon the performance of a condition subsequent, its non-performance within that time is only ground for forfeiture, upon proceedings had for that purpose.<sup>18</sup> There are many circumstances which,—while they may constitute grounds for dissolution at the suit of the State, the corporate creditors, or shareholders,—do not of themselves work a dissolution.<sup>19</sup> If the law clearly provides that the corporation shall cease to exist upon the happening of a specified contingency, it has been held that such happening *ipso facto* dissolves the corporation, without necessity for any legal action or judicial decree for forfeiture, but in such a case, “it requires, however, strong and unmistakable language, . . . to authorize the court to hold that it was the intention of the legislature to dispense with judicial proceedings on the intervention of the attorney-general.<sup>20</sup> Where a railroad charter required construction of a mile of road within three years, otherwise its franchise to “be deemed forfeited and terminated,” the court said: “The general principle is not disputed that a corporation, by omitting to perform a duty imposed by its charter, or to comply with its provisions does not *ipso facto* lose its corporate character, or cease to be a corporation, but simply exposes itself to the hazard of being deprived of its corporate character and franchises, by the judgment of the court, in an action instituted for that purpose by the attorney-general in behalf of the people; but, it cannot be denied that the legislature has the power to provide that a corporation may lose its corporate existence, without the intervention of the courts, by an omission of duty or violation of its charter, or default as to limitations imposed, and whether the legislature has intended so

<sup>16</sup> Zang v. Wyant (1898), 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145.

<sup>17</sup> Sleeper v. Norris (1898), 59 Kan. 555; Brooklyn, etc. Co. v. City, etc., 78 N. Y. 524.

<sup>18</sup> Sturges v. Vanderbilt, 73 N. Y. 384; La Grange, etc. Co. v. Rainey, 7 Coldw. (Tenn.) 432.

<sup>19</sup> Sala v. City of New Orleans, 2 Woods, 188, Fed. Cas. No. 1,246; Commonwealth v. Lykens, etc. Co., 110 Pa. St. 391; Houston v. Houston, etc. Co., 84 Tex. 581.

<sup>20</sup> New York, etc. Bridge Co. v. Smith, 148 N. Y. 540.

to provide in any case, depends upon the construction of the language used. Here, the language used shows that the legislature intended to make the continued existence of the plaintiff, as a corporation, depend upon its compliance with the requirements of section seventeen of the original act. In case of non-compliance, the act itself was to cease to have any operation; and all the powers, rights and franchises thereby granted, were to be deemed forfeited and terminated. There was to be, not merely a cause of forfeiture which could be enforced in an action instituted by the attorney-general, but the powers, rights and franchises were to be taken and treated as forfeited and terminated. At the end of the time limited, the corporation was to come to an end, as if that were the time limited in its charter for its corporate existence.<sup>21</sup> The rule is, that non-compliance with a condition subsequent, imposed by the corporate charter or general law, is merely ground for forfeiture, by direct *quo warranto* proceedings on behalf of the State to forfeit the charter; but it can not be collaterally attacked by private persons, or other corporations, or by the State itself. And so, it is held that a condition subsequent in the charter, or general law, providing that upon non-compliance therewith, the corporation shall cease to exist, or be dissolved, or its charter be forfeited, does not mean dissolution or forfeiture *ipso facto* upon such non-compliance, but means that it shall be ground for judicial proceedings to declare dissolution or forfeiture.<sup>22</sup> For examples: where the charter required a railroad corporation to construct its road within the time specified, or, upon failure that its franchises should "cease and be void,"<sup>23</sup> and where a bridge corporation was required to commence construction of its bridge within two years;<sup>24</sup> and where the general incorporation law provided that, upon neglect of the corporation for six months to prosecute its business, "its corporate powers should also cease."<sup>25</sup> The refusal by one of the two persons constituting a corporation, to be longer bound by an agreement to share the

<sup>21</sup> Brooklyn, etc. Co. v. City, etc., 78 N. Y. 524.

Bank v. Construction Co., 17 D. C. App. Cas. 524.

<sup>22</sup> Flint, etc. Co. v. Woodhull, 25 Mich. 99, 12 Am. Rep. 233; Vermont, etc. Co. v. Vermont Central R. R. Co., 34 Vt. 2; Day v. Ogdensburg, etc. Co., 107 N. Y. 129; People v. Los Angeles Ry. Co., 91 Cal. 338, 27 Pac. 673; Ohio Nat.

<sup>23</sup> State v. Spartanburg, etc. Co., 51 S. C. 129, 28 S. E. 145.

<sup>24</sup> New York & L. I. Bridge Co. v. Smith, 148 N. Y. 540, 42 N. Y. 1088.

<sup>25</sup> Wallamet Falls, etc. Co. v. Kittridge, 5 Sawy. 44, Fed. Cas. No. 17,105.

expenses and profits equally, does not work a dissolution. To a suit brought by one for labor done after such an abrogation, the corporation must be made a party.<sup>26</sup>

**§ 1309. Repeal. Legislative power to annul the charter.**—*In England*, the power of parliament over corporations being unrestricted by any written constitution, is absolute.

*In the United States*, the power of the State legislature is limited:<sup>27</sup> (First) by the Federal Constitution, prohibiting the passage of any State law to impair the obligation of any contract, (as the contract of incorporation) and,<sup>28</sup> (Second) by the constitution of the State. In the absence of any reserved power of the legislature, it may not annul, or revoke the corporate charter, without the consent of the corporators. But the States generally, in their constitutions, have provided that the legislature shall create no corporation, without reserving the right to control it by repeal or amendment of its charter. The corporate franchises can not be revoked, or annulled, except by the State which granted them.<sup>29</sup> The federal government can not annul a franchise, conferred by a State, within its jurisdiction, unless to accomplish some federal purpose.<sup>30</sup> The franchise, or legal rights, which a State has conferred on a corporation, can not be annulled by the act of another State, or by a decree of its courts.<sup>31</sup> The effect of dissolution, by repeal or otherwise, is not to impair the obligation of contracts between the corporation and third persons. “The dissolution of the corporation under the acts . . . cannot, in any just sense, be considered, within the clause of the constitution of the United States on this subject, and impairing of the obligation of the contracts of the company by those States, any more than the death of a private person can be said to impair the obligation of his contracts. The obligation of those contracts survives, and the creditors may enforce their claims against any property belonging to the corporation,—which has not passed into the hands of *bona fide* purchasers, but is still held in trust for the company, or for the stockholders thereof, at the time of its dissolution,—in any mode permitted by the local laws.”<sup>32</sup> Absolute re-

<sup>26</sup> *McKay v. Beard*, 20 S. C. 156.

<sup>27</sup> *Trustees of Dartmouth College v. Woodward*, 1 N. H. 111.

<sup>28</sup> Const. U. S., art. 1, sec. 10; *Bruffett v. Great Western R. R. Co.*, 25 Ill. 353.

<sup>29</sup> *State v. Adams*, 44 Mo. 570.

<sup>30</sup> *Thorpe v. Rutland, etc. R. R.*,

27 Vt. 141, 62 Am. Dec. 625; *Importing, etc. Co. v. Locke*, 50 Ala. 335.

<sup>31</sup> *Society, etc. v. New Haven, 8 Wheat. (U. S.) 483; Merrick v. Van Santvoord*, 34 N. Y. 208.

<sup>32</sup> *Mumma v. Potomac Co.*, 8 Pet. (U. S.) 281; *People v. O'Brien*, 11

peal of the charter terminates the corporate existence,—no judgment can afterward be rendered against the corporation;<sup>33</sup> but the repeal of the charter can not affect rights vested under the corporation. Though its existence is ended, its property, property rights, and valid contracts—survive.<sup>34</sup> Notwithstanding repeal the corporation continues to exist sufficiently for the purpose of being sued on pre-existing obligations, or being brought into court by notice in antecedent proceedings.<sup>35</sup>

**§ 1310. Voluntary surrender of the charter.**—A corporation is not dissolved by the assumption on the part of its members that it is dissolved, nor by a vote of the stockholders to dissolve it merely to escape liability.<sup>36</sup> A corporation may be dissolved by the surrender of its charter to the State by which it was created, and by the State's acceptance, or by such surrender under prescribed statutory authority, which is equivalent to acceptance by the State.<sup>37</sup> But when not actuated by improper motives, the stockholders may effect a voluntary dissolution by surrender of the charter, by a unanimous vote.<sup>38</sup> In the absence of a statute, there is no method by which the members, unless they are unanimous, can dissolve a corporation. No shareholder, against the will of the majority, can force the corporation to continue its operations.<sup>39</sup> When the rights of the State do not intervene, a majority of the shareholders, if so authorized by charter, may dissolve the corporation and wind up its affairs.<sup>40</sup> A minority can not compel a

N. Y. 1, 52 N. Y. Sup. Ct. 519, 2 L. R. A. 255.

*Cf.* Polar Star Lodge v. Polar Star Lodge, 16 La. Ann. 53.

<sup>33</sup> Thornton v. Marginal R. Co., 122 Mass. 32; Marion, etc. Co. v. Perry, 74 Fed. Rep. 426, 33 L. R. A. 252; Nelson v. Hubbard, 96 Ala. 238, 17 L. R. A. 375; Combes v. Keyes, etc. Ry. Co., 46 Am. St. Rep. 839, 89 Wis. 297, 27 L. R. A. 369.

<sup>37</sup> Taylor v. Holmes, 14 Fed. 498, 127 U. S. 489; Greeley v. Smith, 3 Story, 657; Fed. Cas. No. 5,748; McMahon v. Morrison, 16 Ind. 172, 79 Am. Dec. 418; Houston v. Jefferson College, 63 Pa. St. 428; Combes v. Keyes, 89 Wis. 297, 27 L. R. A. 369, 46 Am. St. Rep. 839.

<sup>34</sup> People v. O'Brien, 11 N. Y. 1, 2 L. R. A. 255, 7 Am. St. Rep. 684; Fletcher v. Peck, 6 Cranch. (U. S.) 87.

<sup>38</sup> Wheeler v. Pullman, etc. Co., 143 Ill. 197, 17 L. R. A. 818.

<sup>35</sup> Board of Councilmen, etc. v. Deposit Bank, etc. (1903), 124 Fed. 18. *Vide supra*, § 1300, REPEAL OF CHARTER.

<sup>39</sup> St. Louis, etc. Coal Co. v. Sandoval Coal Co., 116 Ill. 170.

<sup>36</sup> Baptist Meeting House v. Webb, 66 Me. 398; Rollins v. Clay, 33 Me. 132; Portland, etc. Co. v. Portland, 12 B. Mon. 77.

<sup>40</sup> Treadwell v. Salisbury Mfg. Co., 7 Gray (73 Mass.), 393, 66 Am. Dec. 490; Lauman v. Lebanon, etc. R. Co., 30 Pa. St. 42, 72 Am. Dec. 685; Skinner v. Smith, 134 N. Y. 240; Webster v. Turner, 12 Hun (N. Y.), 264.

dissolution, or, in absence of fraud, have a receiver appointed, even in case of hopeless insolvency.<sup>41</sup> And there are cases in which it is held that certain acts or the omission of certain functions, may be equivalent to surrender.<sup>42</sup> In the stockholders is vested the sole and absolute power of declaring a surrender of the charter; the directors, officers and agents have no other powers than in the administration of the corporate affairs and to put in effect the objects of its existence.<sup>43</sup> But where a minority of stockholders oppose a surrender, it can not be forced upon them by the majority;<sup>44</sup> unless it be a case where it is plain that a continuation of the business, to the expiration of the time fixed by the act of incorporation for corporate existence, would result only in financial catastrophe, or the failure of the object for which the corporation was created,<sup>45</sup>—in which event a majority only of the stockholders may surrender the charter and take steps to have the business wound up.<sup>46</sup> So also in case of dissolution of an

<sup>41</sup> Denike v. N. Y., etc. Lime Co., 80 N. Y. 599. See Hardon v. Newton, 14 Blatchf. 376.

<sup>42</sup> Slee v. Bloom, 19 Johns. 456, 10 Am. Dec. 273; Hollingshead v. Woodward, 107 N. Y. 96; Barclay v. Talman, 4 Edw. Ch. 124; Mumma v. Potomac Co., 8 Pet. 281; Bradt v. Benedict, 17 N. Y. 93; Bruce v. Platt, 80 N. Y. 379; Enfield, etc. Bridge Co. v. Connecticut River Co., 7 Conn. 28; 2 Kent's Commentaries, 305, 313, 314; Hampshire v. Franklin, 16 Mass. 76; McLaren v. Pennington, 1 Paige, 102; King v. Amery, 2 Term Rep. 515; King v. Gray, 8 Mod. 358; Webster v. Turner, 21 Hun, 264; Mobile, etc. R. Co. v. State, 29 Ala. 573; La Grange, etc. R. Co. v. Rainey, 7 Coldw. 420; Chesapeake, etc. Canal Co. v. Baltimore, etc. R. Co., 4 Gill & J. 1; Savage v. Walsh, 26 Ala. 619; Folger v. Columbian Ins. Co., 99 Mass. 274, 96 Am. Dec. 747; Boston Glass Manufactory v. Langdon, 24 Pick. 49.

<sup>43</sup> Treadwell v. Salisbury Mfg. Co., 7 Gray, 393, 66 Am. Dec. 490; Abbot v. American, etc. Co., 33 Barb. 578; Hancock v. Holbrook, 9 Fed. Rep. 353; Buford v. Keokuk,

etc. Packet Co., 3 Mo. App. 159; Black v. Delaware, etc. Canal Co., 24 N. J. Eq. 455; Kean v. Johnson, 9 N. J. Eq. 401; Marr v. Union Bank, 4 Coldw. 484; *In re Factage Parisien*, 34 L. J. Ch. 140; Bank of Switzerland v. Bank of Turkey, 5 L. T. (N. S.) 549; *In re Suburban Hotel Co.*, L. R. 2 Ch. 737.

<sup>44</sup> Zabriskie v. Hackensack, etc. R. Co., 18 N. J. Eq. 178; Kean v. Johnson, 9 N. J. Eq. 401; Polar Star Lodge v. Polar Star Lodge, 16 La. Ann. 53; Mobile, etc. R. Co. v. State, 29 Ala. 573; Savage v. Walsh, 26 Ala. 619; Denike v. New York, etc. Co., 80 N. Y. 599; Webster v. Turner, 12 Hun, 264.

<sup>45</sup> Treadwell v. Salisbury Mfg. Co., 7 Gray, 393; Wilson v. Central Bridge, 9 R. I. 590; Mobile, etc. Co. v. State, 29 Ala. 573; Hancock v. Holbrook, 9 Fed. Rep. 353; Revere v. Boston, etc. Co., 15 Pick. 351; Black v. Delaware, etc. Canal Co., 22 N. J. Eq. 130; Bank of Switzerland v. Bank of Turkey, 5 L. T. (N. S.) 549; McCurdy v. Myers, 44 Pa. St. 535; Lauman v. Lebanon, etc. R. Co., 30 Pa. St. 421.

<sup>46</sup> Wilson v. Central Bridge Co., 9 R. I. 590; Sargent v. Webster,

association.<sup>47</sup> A private corporation may be dissolved by the stockholders, without the consent of the State.<sup>48</sup> A voluntary winding up by the majority will not be interfered with by the courts except when the interests of the minority stockholders demand it.<sup>49</sup> The consent of the State is necessary, however, to an attempted voluntary dissolution by a corporation, whether purely private or *quasi-public*. But the corporate contract between the State and the corporation, can not be rescinded, and dissolution effected, without the consent of both parties to the contract. Though the corporation may dispose of all its property, and discontinue its business, it cannot legally dissolve the corporation, by simple resolution of its members, and surrender of its charter, without statutory authority for such surrender, or subsequent acceptance or ratification of the State.<sup>50</sup> Unless otherwise provided by statute, a voluntary surrender of the charter does not dissolve the corporation, until accepted by the legislature.<sup>51</sup>

**§ 1311. Expiration of term of corporate existence.**—The charter is perpetual and irrevocable where no time is limited therein for its duration.<sup>52</sup> No entry of decree of dissolution is neces-

13 Met. 504; Angell & Ames on Corporations, § 127 *et seq.*; Binney's Case, 2 Bland, 99; Mayor of Colchester v. Lawton, 1 Ves. & B. 226. Cf. Kean v. Johnson, 9 N. J. Eq. 401; Mobile, etc. R. Co. v. State, 29 Ala. 373; Wilson v. Miers, 10 C. B. (N. S.) 348. *Contra*, Curien v. Santini, 16 La. Ann. 27; Polar Star Lodge v. Polar Star Lodge, 16 La. Ann. 53; Barry v. Broach (1888), 65 Miss. 450. Minority stockholders cannot make a surrender. Denike v. New York, etc. Co., 80 N. Y. 599.

<sup>47</sup> Barton v. Enterprise Loan & Build. Assn. (1887), 114 Ind. 226, 5 Am. St. Rep. 608; Polar Star Lodge v. Polar Star Lodge (1861), 10 La. Ann. 53.

<sup>48</sup> Merchants' & Planters' Line v. Wagner, 71 Ala. 581; Hollingshead v. Woodward, 107 N. Y. 96; Briggs v. Penniman, 8 Cow. 387; Slee v. Bloom, 19 Johns. 456; Brandt v. Benedict, 17 N. Y. 96; Bruce v. Platt, 80 N. Y. 379.

<sup>49</sup> *In re Beaujolais Wine Co.*, L. R. 3 Ch. 15; *In re London, etc. Discount Co.*, L. R. 1 Eq. 277; People v. Hektograph Co., 10 Abb. New Cas. 358; Booth v. Bunce, 33 N. Y. 139, 88 Am. Dec. 372; Treadwell v. Salisbury Mfg. Co., 7 Gray, 393; Hodges v. New England Screw Co., 1 R. I. 347. Cf. White Mountains R. Co. v. White Mountains, etc. R. Co., 50 N. H. 50; Rorke v. Thomas, 56 N. Y. 559; Barclay v. Quicksilver Mining Co., 9 Abb. Pr. (N. S.) 283, 6 Lans. 25; Bronson v. La Crosse Ry. Co., 2 Wall. 283; Young v. Moses, 53 Ga. 638; Talbot v. Scrips, 31 Mich. 268.

<sup>50</sup> Boston Glass Manufactory v. Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292; Taylor v. Holmes, 14 Fed. 498; Riddle v. Proprietors, etc., 7 Mass. 169, 5 Am. Dec. 35.

<sup>51</sup> Att'y-Gen. v. Superior, etc., 93 Wis. 604; Mylrea v. Superior, etc. Ry. (Wis. 1896), 67 N. W. 1138.

<sup>52</sup> National Waterworks Co. v. Kansas City (1895), 65 Fed. 691;

sary, where it occurs *ipso facto* upon expiration of the term of corporate existence.<sup>53</sup> Where the charter of a corporation, or the general law under which it is organized, fixes the term for the existence of the corporation, it will, upon the expiration of the term, become *ipso facto* dissolved. "There is no difference in this respect between a corporation and a copartnership, formed by agreement of its members, to continue during a limited time, except, that, in case of copartnership the existence of the association may be extended by unanimous consent of its members beyond the time first agreed upon, while the lawful existence of a corporation can not be continued, even by unanimous consent of its members, after their franchise of acting in a corporate capacity has expired."<sup>54</sup> Upon expiration of the time limited by the charter for its existence, its dissolution is complete, by declaration of the legislature itself, and no judicial determination of that fact is requisite. The corporation is *de facto* dead.<sup>55</sup> A corporation has the capacity of perpetual succession, and will exist forever, unless its term is limited by statute. Under modern statutes, the life of a corporation is generally limited to a term of years. When a corporation is created by a special act, without any limitation as to the term of duration, the charter gives it the capacity of perpetual existence.<sup>56</sup> In such case the assets must be distributed when any one of the members insists upon it.<sup>57</sup> Thus if the constitution of a building association provides that it shall proceed to close when the unsold stock is worth fifty per cent. premium, it can not, after that time has come, defer closing in prospect of a further advance in the value of its real estate, and meanwhile compel stockholders to keep paying dues.<sup>58</sup> The business

Snell v. Chicago (1890), 133 Ill. 413, 8 L. R. A. 858; Suburban, etc. Co. v. Inhabitants; etc., 41 Atl. 865 (N. J. 1898).

<sup>53</sup> People v. James (1896), 5 N. Y. 412.

<sup>54</sup> Morawetz, Pri. Corp. 1005.

<sup>55</sup> Thompson, Corp. 530; Bradley v. Reppell, 133 Mo. 545, 54 Am. St. Rep. 685; Sturges v. Vanderbilt, 73 N. Y. 384.

<sup>56</sup> Snell v. City of Chicago, 133 Ill. 413, 8 L. R. A. 858.

<sup>57</sup> Mann v. Butler (1847), 2 Barb. Ch. 362; Greely v. Smith, 3 Story, 657; People v. Walker, 17 N. Y.

502; Ashville Division v. Aston, 92 N. C. 578; Sturges v. Vanderbilt, 73 N. Y. 384; Bank of Galliopolis v. Trimble, 6 B. Mon. 599; Bank of Mississippi v. Wrenn, 11 Miss. 791; Eagle Chair Co. v. Kelsey, 23 Kan. 635; Koutz v. Paola Town Co., 20 Kan. 397; Frothingham v. Barry, 6 Hun, 366; McVicker v. Ross, 55 Barb. 247. Cf. Taylor v. Earle, 8 Hun, 1; Butterfield v. Beardsley (1874), 28 Mich. 412.

<sup>58</sup> Burns v. Metropolitan Building Assn., 2 Mackey (D. C.), 7. Where the charter, or certificate

of a corporation may, however, be continued by the formation of a new organization at the end of the period limiting the existence of the old company, and a transfer of its assets and business. And statutory provision is made in some States for the continuance of corporate life by complying with certain formalities.<sup>59</sup> If a corporation has a special charter, its term of existence is not affected by any statutory provisions foreign to the charter.<sup>60</sup>

**§ 1312. Dissolution by a court of equity. Judgment of sequestration.**—A court of equity, in absence of statutory authority, has no power to remove corporate officers,<sup>61</sup> or dissolve the corporation and divide its property at the suit of a shareholder, or at suit of the State, as there is adequate remedy at law by *quo warranto*.<sup>62</sup> But a court of equity may always interfere upon equitable grounds to grant relief against a corporation at the suit of an individual, upon the same terms as against a natural person under similar circumstances.<sup>63</sup> Some States by statute

of incorporation, states that the corporation is to continue in business until such a date, the last day named must be excluded from the reckoning. *People v. Walker*, 17 N. Y. 502.

<sup>59</sup> N. Y. Laws of 1890, ch. 563, § 22.

<sup>60</sup> *Steadman v. Merchants' etc. Bank* (1888), 69 Tex. 50. The charter of the Ladies of the Sacred Heart named no limitation to its corporate existence. It stated the purpose of the corporation to be to conduct a seminary of learning and an orphan asylum, and provided that it "by that name and style shall have succession." The charter, also, was specific in its grant of powers. The institution was purely a charitable one. *Rev. Stat. Mo. 1845*, ch. 34, § 1, par. 1, provides that every corporation, as such, has power to have succession by its corporate name for the period limited in its charter, and, when no period is limited in its charter, for twenty years. It also gives power to make laws for transfer of stock, and makes other provis-

ions which could not apply to charitable corporations having no shareholders. And it was held that the corporate existence of the Ladies of the Sacred Heart was not limited to twenty years, but was made perpetual. *State v. Ladies of the Sacred Heart* (1889), 99 Mo. 533.

<sup>61</sup> *Neall v. Hill*, 16 Cal. 146, 76 Am. Dec. 508.

<sup>62</sup> *Republican, etc. Co. v. Brown*, 58 Fed. 644, 24 L. R. A. 776, 19 U. S. App. 203; *Wallace v. Pierce-Wallace, etc. Co.*, 101 Iowa, 313, 38 L. R. A. 122; *Folger v. Columbian, etc. Co.*, 99 Mass. 267, 96 Am. Dec. 747; *Strong v. McCagg*, 55 Wis. 624; *Mason v. Supreme Court*, 77 Md. 483; *Hunt v. Le Grand, etc. Co.*, 143 Ill. 118; *Supreme, etc. v. Baker*, 134 Ind. 293; *Denike v. N. Y. etc. Co.*, 80 N. Y. 599; *Hitch v. Hawley*, 132 N. Y. 212; *Coquard v. National Lo. Co.*, 171 Ill. 480; *Oldham v. Mt. Sterling, etc. Co.*, 103 Ky. 529, 45 S. W. 779.

<sup>63</sup> *Attorney-General v. R. Cos.*, 35 Wis. 532; *Delaware, etc. Co. v. Camden, etc. Co.*, 16 N. J. Eq. 321;

provide that an information in the nature of *quo warranto*, may be filed at the relation of a shareholder to compel dissolution of an illegally existing corporation. "Equity may properly compel officers of corporations to account for any breach of trust in their official capacity; yet in the absence of statutes extending its jurisdiction it will usually decline to assume control over the management of the affairs of a corporation upon a bill . . . alleging fraud, mismanagement, and collusion on the part of the corporate authorities, since such interference would necessarily result in the dissolution of the corporation, and the court would thus accomplish indirectly what it has no power to do directly. The remedial power exercised by courts of equity in such cases, ordinarily extends no further than the granting of an injunction against any special misconduct on the part of the corporate officers; and although the facts shown may be sufficient foundation for such an injunction, the court will not enlarge its jurisdiction by taking the affairs of the corporation out of the management of its own officers and placing them in the hands of a receiver."<sup>64</sup> But, if necessary, to give complete relief from fraud practiced through a corporate organization, a court of equity may dissolve the corporation.<sup>65</sup> A court of equity has no jurisdiction to dissolve the corporation and distribute its assets,<sup>66</sup> but it may appoint a receiver to preserve the assets in danger of loss for want of directors,<sup>67</sup> and may compel the directors in case of fraudulent administration to account and to wind up the corporation.<sup>68</sup>

*Dissolution by court of equity, at instance of creditors.*—A corporation is not dissolved by the fact that it has lost or conveyed

Raritan, etc. Co. v. Delaware, etc. Co., 18 N. J. Eq. 546. *Vide supra*, §§ 1294, 1301, JURISDICTION AND POWERS OF THE COURTS.

<sup>64</sup> High on Receivers, 238; Republican, etc. Mines v. Brown, 24 L. R. A. 776, 58 Fed. 644, 19 U. S. App. 203.

<sup>65</sup> Miner v. Belle Isle Ice Co., 93 Mich. 97.

<sup>66</sup> Mason v. Equitable League (1893), 77 Md. 483, 39 Am. St. Rep. 433; Sternberg v. Wolff (1898), 56 N. J. Eq. 555; Ulmer v. Maine, etc. Co. (1899), 93 Me. 324; State, etc. Co. v. San Francisco, etc. (1894), 101 Cal. 135; People

v. Weighley (1895), 155 Ill. 491; Clark v. National, etc. Co. (1900), 105 Fed. 787; Barton v. International, etc. (1897), 83 Md. 14; U. S. Trust Co. v. N. Y. etc. R. R. (1896), 101 N. Y. 478; Taylor v. Decatur, etc. Co. (1901), 112 Fed. 449; Henkley v. Pfister (1892), 83 Wis. 64; Wheeler v. Pullman Iron Co. (1892), 143 Ill. 197, 17 L. R. A. 818.

<sup>67</sup> Tennessee, etc. Co. v. Ayres (Tenn. 1897), 43 S. W. 744; Noble v. Gadsden, etc. Co. (Ala. 1902), 31 South. 857.

<sup>68</sup> Jellenik v. Huron, etc. Co. (1899), 177 U. S. 1.

all its assets away,<sup>69</sup> nor by the sequestration of its property.<sup>70</sup> For the possession of property is not essential to corporate existence.<sup>71</sup> The sale of all the corporate property may terminate the business, but it does not dissolve the corporation, for it may exist without property.<sup>72</sup> The corporate franchises, not being assignable, neither the directors, nor the whole body of shareholders can sell the franchise to be a corporation. Such franchise belongs to the corporation, or its successors, or to the assigns of the corporate stock; and only the State can authorize its transfer in any other manner than by surrender to the State.<sup>73</sup> The cor-

<sup>69</sup> *Swan Land & Cattle Co. v. Frank* (1889), 39 Fed. Rep. 456; *State v. Western Irrigating Canal Co.* (1888), 40 Kan. 96, 10 Am. St. Rep. 166; *Kincaid v. Dwinelle*, 59 N. Y. 548; *Troy, etc. R. Co. v. Kerr*, 17 Barb. 581; *Barclay v. Talman*, 4 Edw. Ch. 123, 129; *Moseby v. Burrow*, 52 Tex. 396; *Kansas City Hotel Co. v. Sauer*, '65 Mo. 279; *State v. Merchant*, 37 Ohio St. 251; *Rollins v. Clay*, 33 Me. 132; *De Camp v. Aylward*, 52 Ind. 468; *Richwald v. Commercial Hotel Co.*, 106 Ill. 439; *Bruffet v. Great Western R. Co.*, 25 Ill. 353; *New Jersey Zinc Co. v. New Jersey Franklinite Co.*, 13 N. J. Eq. 322; *Russell v. McLellan*, 14 Pick. 63; *Sullivan v. Truinfo, etc. Co.*, 39 Cal. 459. Proof that at the time of a transfer by a corporation it was in fact insolvent, is not conclusive that the assignment was made "in contemplation of the insolvency of such company," within 1 N. Y. Rev. Stat. 603, § 4; to come within the prohibition of the statute, the act must have been done because of existing or contemplated insolvency. *Paulding v. Chrome Steel Co.*, 94 N. Y. 334. Allegations in the bill that complainant purchased all of the property of the vendor corporation, and that since the sale the vendor had divided its assets among its stockholders, and ceased to exercise its franchise, furnishes no excuse for not making the vendor a party, as the corporation was not

dissolved by the mere non-use of its franchise, or by the want of assets. *Swan Land & Cattle Co. v. Frank*, 39 Fed. Rep. 456.

<sup>70</sup> *Mann v. Pentz*, 3 N. Y. 415; *Huguenot National Bank v. Steedwell*, 6 Daly, 13, reversed on another point, 74 N. Y. 621. Where the property of a corporation is sold pursuant to judicial decree it is not thereby dissolved. *Smith v. Gower*, 2 Duv. 17. *Acc. State v. Rives*, 5 Ired. 297; *Bruffett v. Great Western R. Co.*, 25 Ill. 353; *State v. Merchant*, 37 Ohio St. 251.

<sup>71</sup> *State v. Western, etc. Co.* (1888), 40 Kan. 96, 10 Am. St. Rep. 166; *Moseby v. Burrow*, 52 Tex. 396; *National Bank v. Insurance Co.*, 104 U. S. 54.

<sup>72</sup> *Parker v. Bethel Hotel Co.*, 96 Tenn. 352, 31 L. R. A. 706; *Richwald v. Hotel Co.*, 106 Ill. 439; *United States v. Little Miami, etc. Co.*, 1 Fed. 700; *Swan Land etc. Co. v. Frank*, 39 Fed. 456; *Higgins v. Downward*, 8 Houst. (Del.) 227, 40 St. Rep. 141; *State v. Bank of Md.*, 6 Gill & J. (Md.) 205, 26 Am. Dec. 561; *Boston Glass Manuf. v. Langdon*, 24 Pick. (Mass.) 49, 35 Am. Dec. 292; *Sewell v. East, etc. Co.*, 50 N. J. Eq. 717; *Kincaid v. Dwinelle*, 59 N. Y. 548; *Sleeper v. Goodwin*, 67 Wis. 577; *Price v. Holcomb*, 89 Iowa, 123; *Bump v. Butler Co.*, 93 Fed. 290.

<sup>73</sup> *Memphis L. R. Ry. Co. v. Comm's*, 112 U. S. 609; *Snell v. City of Chicago*, 133 Ill. 413, 8 L.

poration does not cease to exist because it has stopped or abandoned business,<sup>74</sup> and divided up its property among its shareholders, and apportioned its debts among them. A note afterwards made by the corporation is binding upon it,<sup>75</sup> nor does the loss of all its property dissolve the corporation,<sup>76</sup> nor does its assignment for the benefit of its creditors,<sup>77</sup> or its lease for a long term,<sup>78</sup> or its mere insolvency. "The corporation, notwithstanding the proceedings in insolvency, may have assets sufficient to pay all its debts; and then no impediment would exist, before a surrender pursuant to law, or a forfeiture ascertained and declared by a proper judicial proceeding. Or, if their capital is impaired or wholly gone, this seems to be no reason, before such surrender or forfeiture, to prevent the members from furnishing renewed capital, and then proceeding to use the corporate powers."<sup>79</sup>

*Judgment of sequestration* does not dissolve the corporation. It is only a temporary holding of the property by the court, pending the satisfaction of certain claims.<sup>80</sup>

R. A. 858; Commonwealth v. Smith, 10 Allen (92 Mass.), 448, 87 Am. Dec. 672; Hall v. Sullivan Ry. Co., 21 L. R. 138 (2 Redfield's Am. Ry. Cases, 621; 1 Bruner's Collected Cases, 613); Meyer v. Johnston, 53 Ala. 237; Willamette Manuf. Co. v. Bank, 119 U. S. 191; State v. Railway Co., 140 Mo. 539.

<sup>74</sup> Salina Nat. Bank v. Prescott, 60 Kan. 490, 57 Pac. 12; Brandt v. Benedict, 17 N. Y. 93; Slee v. Bloom, 5 Johns. Ch. (N. Y.) 366, 19 Johns. (N. Y.) 456; Sleeper v. Norris, 59 Kan. 555, 53 Pac. 757; Richards v. Minn. Savings Bank, 75 Minn. 196.

<sup>75</sup> Bradley v. McKee, 5 Cranch, C. C. 298, Fed. Cas. No. 1,784.

<sup>76</sup> *In re Belton*, 47 La. Ann. 1614, 30 L. R. A. 648.

<sup>77</sup> Town v. Bank, etc., 2 Douglas (Mich.), 530; State v. Butler, 86 Tenn. 614, 8 S. W. 586; Boston Glass Manuf. v. Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292; State v. Commercial Bank, etc. Co., 13 Sm. & M. (21 Miss.) 569, 53 Am. Dec. 106; Weyeth, etc. Co. v. James, etc. Co., 15 Utah. 110; De Camp v. Alward, 52 Ind. 468.

<sup>78</sup> United States v. Little Miami, etc. Co., 1 Fed. 700; Topeka Paper Co. v. Oklahoma Pub. Co., 7 Okla. 220, 54 Pac. 455.

<sup>79</sup> Coburn v. Boston Paper Mache Co., 10 Gray, 245; Mosebey v. Burrow, 52 Tex. 396; Shenandoah Valley R. Co. v. Griffith, 76 Va. 913; Valley Bank v. Sewing Society, 28 Kan. 423; Electric Light Co. v. Leiten, 19 Dist. Col. 575; National Bank v. Insurance Co., 104 U. S. 54; Boston, etc. Co. v. Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. (49 Wilgus Cases) 292; Reichwald v. Hotel Co., 106 Ill. 439; Auburn, etc. Co. v. Sylvester, 68 Hun (N. Y.), 401; State v. Commercial Bank, etc., 13 Sm. & M. (21 Miss.) 569, 53 Am. Dec. 106; Jackson v. McInnis, 33 Oreg. 529, 72 Am. St. Rep. 755; Stolze v. Manitowoc, etc. Co., 100 Wis. 208; New Jersey, etc. Co. v. Board of R. R. Comm'r's, 41 N. J. Law, 235; Second Nat. Bank v. N. Y. etc. Co., 11 Fed. 532.

<sup>80</sup> *Vide supra*, § 1012, SEQUESTRATION; Adams v. Kehlor, etc. Co., 35 Fed. 433; Proctor v. Sidney, etc. Co. (1896), 8 N. Y. App. Div. 42.

**§ 1313. Dissolution at instance of shareholders.**—By unanimous consent the stockholders may dissolve the corporation by surrender of its franchise,<sup>81</sup> and it may be dissolved by a majority of the stockholders when it becomes insolvent, or is failing in business and unable to accomplish the objects of its creation.<sup>82</sup> The directors can not dissolve it.<sup>83</sup> Unless it appears beyond question that the continuation of a profitable business can not be had, the dissolution of a corporation not yet insolvent will not be decreed upon the petition of a minority of its shareholders.<sup>84</sup> If, however, it is clear that the business can not be profitably continued, the petition of a minority for a dissolution will be granted.<sup>85</sup> And persons with whom it has entered into contract

<sup>81</sup> *Houston v. Jefferson College* (1869), 63 Pa. St. 428.

<sup>82</sup> *O'Connor v. Knoxville Hotel Co.* (1894), 93 Tenn. 708, 28 S. W. 308; *Pringle v. Eltringham, etc. Co.* (1897), 49 La. Ann. 301, 21 South. 515; *Price v. Holcomb* (1893), 89 Iowa, 123. *Supra*, § 1310.

<sup>83</sup> *Jones v. Bank of Leadville* (1888), 10 Colo. 464, 17 Pac. 272.

<sup>84</sup> *In re Suburban Hotel Co.*, L. R. 2 Ch. 787; *Pratt v. Jewett*, 9 Gray, 34; *Gilman v. Greenpoint Sugar Co.*, 4 Lans. 483; *In re Joint-Stock, etc. Co.*, L. R. 8 Eq. 146; *In re London Suburban Bank*, L. R. 6 Ch. 641; *Fountain Ferry Co. v. Jewell*, 8 B. Mon. 140. Cf. *In re Pyrolusite Manganese Co.*, 29 Hun, 429; *Denike v. New York, etc. Co.*, 80 N. Y. 599; “Default in Payment of a Call as Affecting the Right to Obtain a Winding-Up Order,” 49 L. T. 201.

<sup>85</sup> *Marr v. Union Bank*, 4 Coldw. 484. In *In re Bristol Joint-Stock Bank*, 44 Ch. Div. 703, Mr. Justice Kekewich said: “I think a shareholder is entitled to come here—certainly he is if supported by several other shareholders, I do not say that a single shareholder would be so entitled—and say, ‘I will not have this business carried on without any reasonable hope of success in order that at some uncertain time hereafter my further capital’—the reserve cap-

ital—‘may be called up and used in payment of debt, which ought not to be incurred.’” In another case, *In re Crown Bank*, 44 Ch. Div. 634, where the banking business was practically given up, and a speculative business in land, stocks, and shares carried on instead, the memorandum of association stated the objects for which the company was formed in terms so wide that the counsel who opposed the winding-up, in answer to a suggestion from the bench, could not say that it would not authorize the company to establish and work a line of balloons passing backwards and forwards between the earth and the moon. In spite of this wide enumeration of objects, Mr. Justice North held that the company was not justified in doing things utterly at variance with the business of banking in the largest sense, the name of the company as its start being treated by his Lordship as of importance, and made an order to wind it up on the petition of a shareholder. Before the order had been passed and entered, it was arranged that the objectors to the present state of things should be bought out; so by consent the petition was dismissed. See also *Masters v. Eclectic, etc. Ins. Co.*, 6 Daly, 455; *In re Factage Parisien*, 34 L. J. Ch. 140, 13 Week. Rep. 214; *In re*

relations will not be heard to oppose the winding-up, where no dishonest motive can be attributed to the shareholders in seeking dissolution.<sup>86</sup> Neither can the officials of the company successfully oppose the winding-up, where their motive is merely that they may receive salaries for conducting the enterprise.<sup>87</sup> Proceedings in equity for the voluntary dissolution of corporations are not adverse proceedings, and are not appealable.<sup>88</sup>

**§ 1314. Non-user and other grounds for dissolution.**—Non-user of corporate franchise will not dissolve a corporation, there must be some action taken by the State to accomplish dissolution,<sup>89</sup>—nor by failure to elect officers,<sup>90</sup> nor by resignation of all the officers.<sup>91</sup> As examples of non-user (as ground sufficient to authorize forfeiture), are:—abandonment of business by a water-works company and efforts to sell out its plant;<sup>92</sup> abandonment of operations for a long time, by a river improvement company with land grant from the State;<sup>93</sup> failure of a railroad corporation to complete its road within the time allowed.<sup>94</sup> Although a corpo-

Great Northern, etc. Mining Co., 17 Week. Rep. 462; Ward v. Sea Ins. Co., 7 Paige, 294; Pratt v. Jewett, 9 Gray, 34; *In re Suburban Hotel Co.*, L. R. 2 Ch. 737; Cramer v. Bird, L. R. 6 Eq. 143; *In re Joint-Stock, etc. Co.*, L. R. 8 Eq. 146; *In re Suburban Bank*, L. R. 7 Ch. 641. See, however, Polar Star Lodge v. Polar Star Lodge, 16 La. Ann. 53; Curien v. Santini, 16 La. Ann. 27. In Wisconsin there is no statute authorizing one of several stockholders to maintain a bill in equity in his own name, or in the name of the state, without leave being first granted therefor, by the supreme court, to dissolve a corporation and convert its property into money, and then divide the same among the stockholders, and, in the absence of such a statute, such a suit cannot be maintained. Strong v. McCagg, 55 Wis. 624.

ss British Water Gas Syndicate, Limited, v. Notts & Derby Co., Limited, 6 Ry. & Corp. J., where the court said: "In the present case the circumstances attending the commencement of the company were such that if the shareholders

had resolved upon a winding-up, it could not be attributed to a dishonest wish on their part, and if there was jurisdiction to interfere with a voluntary winding-up, this was not a case in which it ought to be exercised.

<sup>87</sup> Marr v. Union Bank, 4 Coldw. 484; *In re Factage Parisien*, 34 L. J. Ch. 140; *In re Tumacacori Mining Co.*, L. R. 17 Eq. 534. Cf. Masters v. Eclectic, etc. Ins. Co., 6 Daly, 455.

<sup>88</sup> Cady v. Centreville Knit Goods Manuf. Co., 48 Mich. 133.

<sup>89</sup> Bloch v. O'Connor, etc. Co. (1900), 129 Ala. 528, 29 South. 925; Harrington v. O'Connor (1897), 51 Neb. 214, 70 N. W. 911; Law v. Rich (1900), 47 W. Va. 634, 35 S. E. 858.

<sup>90</sup> Phillips v. Wickham (1829), 1 Paige, 590.

<sup>91</sup> Evarts v. Killingworth Manuf. Co. (1850), 20 Conn. 447.

<sup>92</sup> City Water Co. v. State (Tex. 1895), 33 S. W. 259.

<sup>93</sup> State v. Cannon, etc. Assn. (1896), 67 Minn. 14.

<sup>94</sup> People v. Ulster, etc. R. R. (1891), 128 N. Y. 240.

ration does not exercise all its charter powers, it is not on that account subject to forfeiture of its charter.<sup>95</sup> An act done by a corporation which is sufficient cause for forfeiture of its charter, or of its franchises, does not, of itself, avoid the charter or work the dissolution of the corporation; but the charter remains valid until pronounced forfeited by a judgment rendered on proper proceedings, giving the corporation an opportunity to answer and to be fully heard.<sup>96</sup> Thus a corporation is not dissolved by merely

<sup>95</sup> Ill. etc. R. R. v. Doud (1900), 105 Fed. 123.

<sup>96</sup> Moore v. Schoppert (1884), 22 W. Va. 282; Sturges v. Vanderbilt, 73 N. Y. 384; Hollingshead v. Woodworth, 35 Hun, 410; Cosenback v. Salt Springs Nat. Bank, 53 Barb. 506; Master Stevedores' Assn. v. Walsh, 2 Daly, 14; Cartan v. Father Mathew, etc. Soc., 3 Daly, 20; Mackall v. Chesapeake & Ohio Canal Co. (1876), 94 U. S. 308, 310, the court saying, "We are of opinion that the question of forfeiture could only be established by a direct proceeding on the part of the public authorities, and a decision to that effect in a proper tribunal, and cannot be made an issue for the first time in the trial of this question of private right between the present parties;" Erie & N. E. R. Co. v. Casey, 26 Pa. St. 287, 301; Commonwealth v. Pittsburgh, etc. R. Co., 58 Pa. St. 46; La Grange, etc. R. Co. v. Rainey, 7 Coldw. (Tenn.) 420; Baker v. Backus, 32 Ill. 79; *In re Long Island R. Co.*, 19 Wend. 37; Ward v. Sea Ins. Co., 7 Paige, Ch. 294; Barclay v. Talman, 4 Edw. Ch. 123; Kincaid v. Dwinnelle, 59 N. Y. 548; State v. Real Estate Bank (1843), 5 Ark. 595, 41 Am. Dec. 109, where the court said, "Such a dissolution can only be effected by judicial trial and judgment, and so it has been held even where the act has provided that in default of fulfilling the condition the corporation should be dissolved;" Slee v. Bloom, 5 Johns. Ch. 366; Terrett v. Taylor,

9 Cranch, 51; Crump v. United States Mining Co., 7 Grat. 352; Connecticut, etc. R. Co. v. Bailey, 24 Vt. 465; Selma, etc. R. Co. v. Tipton, 5 Ala. 805; Bohanman v. Binns, 31 Miss. 355; Smith v. Plank Road Co., 30 Ala. 650; Myers v. Manhattan Bank, 20 Ohio, 283; Spencer v. Champion, 9 Conn. 536; National Pahquioque Bank v. First National Bank of Bethel, 36 Conn. 325; Atlantic v. Gate City Gas Light Co., 71 Ga. 106; Deitweiler v. Breckenkamp, 83 Mo. 45; Perrin v. Granger, 30 Vt. 595; Chesapeake & O. Canal Co. v. Baltimore & O. R. Co. (1832), 4 Gill & J. 1, 122, declaring that a "cause of forfeiture can only be enforced by *scire facias*, or a *quo warranto*, issued at the instance of the government creating the corporation, and cannot be taken advantage of incidentally, or in any other way, or by any individual;" Pentz v. Citizens' Fire, etc. Ins. Co., 35 Md. 73; Pearce v. Olney, 20 Conn. 544; Trustees of Vernon Soc. v. Hills, 6 Cow. 23, 16 Am. Dec. 429; Folger v. Columbian Ins. Co., 99 Mass. 267, 96 Am. Dec. 747, and note. 755; Heard v. Talbot, 7 Gray, 113, 119, 120; Pixley v. Roanoke Navigation Co., 75 Va. 320; State v. Fourth N. H. Turnpike Co., 15 N. 162, 41 Am. Dec. 690; Arthur v. Commercial, etc. Bank, 9 Sm. & M. 394, 48 Am. Dec. 719; Williams v. Lowe, 4 Neb. 382; Kennebec, etc. R. Co. v. Kendall, 31 Me. 470; State v. Central Ohio Mut. Relief Assn., 29 Ohio St. 399; State v. New Orleans Gas Light Co., 2 Rob.

neglecting to exercise its corporate powers;<sup>97</sup> nor by the loss of an integral part;<sup>98</sup> nor by inability to carry out a part of the design for which the corporation was organized, where the fundamental design is being accomplished;<sup>99</sup> nor on the ground of insolvency where it refuses or fails to pay its debts on demand,— (unless it appears that it can not continue business and perform the conditions of the charter;) nor in case of assignment by a corporation for the benefit of creditors, where it is not thereby rendered unable to perform the charter conditions;<sup>1</sup> nor by alienation of its property;<sup>2</sup> nor for failure to hold meetings prescribed by its charter or articles, though its neglect may have continued for a considerable period;<sup>3</sup> nor for mere wrongful intent to do acts violative of the charter at some future time;<sup>4</sup> nor by the

(La.) 529; *Wescott v. Minnesota*, etc. Co., 23 Mich. 145; *State v. Vincennes University*, 5 Ind. 77; *Barren Creek Ditching Co. v. Beck* (1884), 99 Ind. 247, 250, saying, "The state alone has the right to insist upon a forfeiture and it may waive this right;" *Enfield Toll Bridge Co. v. Connecticut River Co.*, 7 Conn. 28; *Bank of Missouri v. Merchants' Bank of Baltimore*, 10 Mo. 123; *Atchafalaya Bank v. Dawson*, 13 La. Ann. 497; *King v. Avery*, 2 Term. R. 515; *Boston Glass Mfy. v. Langdon*, 24 Pick. (Mass.) 49, 35 Am. Dec. 292; *State v. Fourth, etc. Co.*, 15 N. H. 162, 41 Am. Dec. 690; *County of Macon v. Shores*, 97 U. S. 272; *Attorney-General v. Chicago & E. Ry. Co.*, 112 Ill. 520; *Barron Creek, etc. v. Beck*, 99 Ind. 247; *Penobscot, etc. Corp. v. Lamson*, 16 Me. 224, 33 Am. Dec. 556; *Toledo, etc. Co. v. Johnson*, 49 Mich. 148; *People v. Ulster, etc. Co.*, 128 N. Y. 240; *In re Philadelphia, etc. Ry. Co.*, 187 Pa. St. 123; *Attorney-General v. Superior, etc. Co.*, 93 Wis. 604.

<sup>97</sup> *Baptist House v. Webb*, 66 Me. 398; *Heard v. Talbot*, 7 Gray, 113; *Brandon Iron Co. v. Gleason* (1852), 24 Vt. 228, 238, which, while admitting that "it is probably true that a legal surrender may be presumed where for a sufficient

length of time there has existed an entire non-user of corporate franchises and a neglect to choose corporate officers," declares that the lapse of time required for that purpose has never been decided, and reiterates the doctrine that the question "cannot be tried, so as to be conclusive upon the corporation, in this collateral or incidental manner."

<sup>98</sup> *Lehigh, etc. Co. v. Lehigh C. & N. Co.*, 4 Rawle, 9, 26 Am. Dec. 111.

<sup>99</sup> *State v. Farmers' College*, 32 Ohio St. 487.

<sup>1</sup> *State v. Commercial Bank*, 13 Sm. & M. (21 Miss.) 569, 53 Am. Dec. 106; *State v. Bailey*, 16 Ind. 46, 79 Am. Dec. 405.

<sup>2</sup> *United States v. Little Miami, etc. Co.*, 1 Fed. 700; *Swan, etc. Co. v. Frank*, 39 Fed. 456; *Sleeper v. Goodwin*, 67 Wis. 577; *Pritchard v. Barnes*, 101 Wis. 86; *Bank of Maryland*, 6 Gill & J. (Md.) 205, 26 Am. Dec. 561.

<sup>3</sup> *State v. Societe Republicaine, 9 Mo. App. 114; State v. Barron*, 58 N. H. 370.

<sup>4</sup> *State v. Beck*, 81 Ind. 500; *Attorney-General v. Superior, etc. Co.*, 93 Wic. 604; *Commonwealth v. Pittsburgh, etc. Ry. Co.*, 58 Pa. St. 26; *State v. Martin*, 51 Kan. 462; *State v. Omaha, etc. Co.*, 91 Iowa, 517.

resignation of all the officers and the omission to elect others;<sup>5</sup> nor by a sale of its property in good faith and for a valuable consideration;<sup>6</sup> nor, generally, by the failure to perform any act prescribed in the charter.<sup>7</sup> Until, therefore, a judgment upon a *quo warranto*, or a decree of court has declared a surrender of the corporate franchises and the dissolution of the corporation,—any creditor is at liberty to proceed by suit against the corporation in the same manner as if the alleged surrender by non-user had not occurred; so also, judgment against the corporation, and an execution and sale of the corporate property under it, before any such proceedings are instituted, will be valid.<sup>8</sup> And one stockholder in a corporation can not recover from another stockholder,

<sup>5</sup> *Evarts v. Killingworth*, 20 Conn. 447; *Pearce v. Olney*, 20 Conn. 543.

<sup>6</sup> *Hill v. Fogg*, 41 Mo. 563; *State v. Atchison, etc. Co.*, 24 Neb. 143, 8 Am. St. Rep. 164; *State v. Turnpike Co.*, 15 N. H. 162; *Henderson, etc. Assn. v. People*, 163 Ill. 196; *State v. Brownstown, etc. Co.*, 120 Ind. 337; *People v. Buffalo, etc. Co.*, 131 N. Y. 140, 15 L. R. A. 240.

<sup>7</sup> *People v. President, etc. Manhattan Co.*, 9 Wend. 351, 382; *Stoop v. Greensburgh, etc. Co.*, 10 Ind. 47. Thus the New York Act of 1875 directs that the commissioners should "provide for the release and forfeiture . . . of all rights and franchises" of railway companies in case of non-completion of the roads *within the time and upon the conditions therein provided*. And in the case of *In re Kings County Elevated R. Co.* (1887), 105 N. Y. 97, decided under this act, the court said: "This, as we have seen, was done in the very language of the act, and assuming with the respondent that the default existed, we are to inquire whether the property right or franchise, then in the company, was by that circumstance and without further act done by any one, or judgment of any court, transferred to the supervisors of Kings county, or at least diverted from the com-

pany. It is certainly well settled that a non-performance of the conditions of an act of incorporation will forfeit the grant, even at common law and like effect is given to such omission by the statute under which the petitioner came into existence; but I am not aware of any case holding that such default does of itself work a forfeiture, or that it can take effect except upon some proceeding where the question is brought directly before the court, unless the statute otherwise provides. The principal cases relied upon by the respondent were within this exception (*In re Brooklyn, W. & N. R. Co.*, 72 N. Y. 245, 75 N. Y. 335). The company then before the court was organized under an act which declared that upon omission to do the thing in question 'its corporate existence and powers shall cease.' And in the *Brooklyn Steam Transit Co. v. City of Brooklyn* (78 N. Y. 524), the charter then before the court provided that upon such omission, 'this act and all the powers, rights and franchises herein and hereby granted shall be deemed forfeited and terminated.' In the last case, the other two were reviewed, but the same principle was said to apply to each."

<sup>8</sup> *Mickles v. Rochester City Bank*, 11 Paige, Ch. 118.

(who has taken and sold the corporate property), the value of his proportionate share of the property sold, on an allegation that the corporation has ceased to do business, although the averment may be strictly true; for its dissolution must be first judicially declared, before its property will vest in the individual stockholders;<sup>9</sup> so, also, a forfeiture must be judicially declared, before the same franchise can be granted to others.<sup>10</sup>

**§ 1315. Dormant corporations. Failure to hold meetings and elect officers. Death of all the members and stockholders.** A corporation is not dissolved by mere non-user of its franchises.<sup>11</sup> A statement, in a petition, that a corporation has ceased to transact business and is insolvent, is not equivalent to an allegation that the corporation is dissolved.<sup>12</sup> The failure or neglect of trustees to hold meetings, does not dissolve the corporation.<sup>13</sup> Mere failure of a corporation to hold meetings, although such failure be continued for a number of years, does not *ipso facto* work a dissolution of the corporation.<sup>14</sup> It can not be dissolved by the resignation of its officers, nor their infidelity to their duty to it.<sup>15</sup> So neglect by a corporation to hold meetings for ten years, is not, in itself, ground for a dissolution.<sup>16</sup> Its existence is not terminated by the failure to elect officers on the day designated by its laws.<sup>17</sup> "The condition of a corporation whose charter has expired, is not the same as that of a corporation which

<sup>9</sup> Hodsdon v. Copeland, 16 Me. 314.

<sup>10</sup> Regents of the University of Maryland v. Williams, 9 Gill & J. 365, 31 Am. Dec. 72. *Vide supra*, § 1294, GROUNDS HELD INSUFFICIENT TO AUTHORIZE FORFEITURE.

<sup>11</sup> Swan Land, etc. Cattle Co. v. Frank (1889), 39 Fed. Rep. 456.

<sup>12</sup> Valley Bank & Savings Inst. v. Ladies' Congregational Sewing Society, 28 Kan. 423.

<sup>13</sup> Philips v. Wickham, 1 Paige, 570; People v. Runkle, 9 Johns. 147; Knowlton v. Ackley, 8 Cush. 93; St. Louis, etc. Loan Assn. v. Augustin, 2 Mo. App. 123; State v. Vincennes University, 5 Ind. 80, 81; President & Trustees, etc. v. Thompson, 20 Ill. 197; People v. Wren, 5 Ill. 269. Cf. Smith v. Smith, 3 Desauss. 557; Ward v. Sea Ins. Co., 7 Paige, 294; People v. Twaddell, 18 Hun, 427.

<sup>14</sup> Eureka L. & I. Co. v. Eureka,

5 Kan. App. 669, 48 Pac. 935; Parson v. Eureka Powder Works, 48 N. H. 66; Packard v. Old Colony R. Co., 168 Mass. 92; Smith v. Natchez, etc. Co., 1 How. (Miss.) 479; State v. Trustees, etc., 5 Ind. 77; State v. Barron, 58 N. H. 370; State v. Societe Republicaine, 9 Mo. App. 114.

<sup>15</sup> People v. Twaddell, 18 Hun, 427; Reilly v. Oglebay, 25 W. Va. 36, 43; Boston, etc. Mahufactory v. Langdon, 24 Pick. 49, 35 Am. Dec. 292; Philips v. Wickham, 1 Paige, 590, 596; Russell v. McLellan, 14 Pick. 63; Evarts v. Killingworth Mfg. Co., 20 Conn. 447; Hoboken, etc. Assn. v. Martin, 13 N. J. Eq. 427; Muscatine Turn Verein v. Funck, 18 Iowa, 469, 472.

<sup>16</sup> State v. Barron, 58 N. H. 370. See State v. Vincennes University, 5 Ind. 80.

<sup>17</sup> Allen v. New Jersey Southern R. Co., 49 How. Pr. 14; People v.

has failed to elect its officers, and, as the consequence of that failure, is rendered inactive. The life of the one is out of it, by its own constitution, and not from a failure to do what its charter enabled them to do, to give them active being; the other was entitled by its charter to a continued active life, but it has failed to continue that activity, by not electing its necessary officers. Its active powers, but not its being, are gone. The one is dead; the other is dormant. The principles of law which apply to a corporation thus dormant or disabled, are not the same as those which are applicable to the rights of a corporation which is dissolved, or civilly dead. In the former case, debts due are extinguished; not so in the latter case."<sup>18</sup> But neglect on the part of the stockholders to elect officers or directors when the offices have become vacant,—so that the business may be conducted in the methods and through the agencies prescribed by law, and the interests of the corporation and those dealing with it preserved,—if it be intentional, is a sufficient reason for the initiation of proceedings by stockholders, or creditors, to dissolve it and have its affairs wound up.<sup>19</sup> Equity can not dissolve a corporation created by the consolidation of several other corporations, on the ground alleged by a stockholder in one of the original corporations, that the consolidation was for a fraudulent purpose, and not legally effected.<sup>20</sup> The old common-law rule that a corporation might be dissolved by the death of all its members, is inapplicable to modern companies having capital stock divided into shares capable of transfer and transmission.<sup>21</sup> The death of all the stockholders will not dissolve the corporation.<sup>22</sup> The shares of the stockholder on his death, pass to his legal representative.<sup>23</sup> A stock

Twaddell, 18 Hun, 427; Reilly v. Oglebay, 25 W. Va. 36, 43; Nashville Bank v. Petway, 3 Humph. 522; Harris v. Mississippi Valley, etc. R. Co., 51 Miss. 602; Swan Land & Cattle Co. v. Frank, 39 Fed. Rep. 456.

<sup>18</sup> Wilmington, etc. R. R. Co. v. Downward (Del.), 14 Atl. 720; Trustees, etc. v. Hills, 6 Cow. (N. Y.) 23, 16 Am. Dec. 429; Evarts v. Killingworth Mfg. Co., 20 Conn. 447.

<sup>19</sup> Bruce v. Platt, 80 N. Y. 379; Knowlton v. Ackley, 8 Cush. 93; Curry v. Woodward, 53 Ala. 375; Brown v. Union Ins. Co., 3 La.

Ann. 177; "Just and Equitable Causes for Winding-up," 73 L. T. 174.

<sup>20</sup> Terhune v. Midland R. Co., 38 N. J. Eq. 423.

<sup>21</sup> Boston, etc. Mfg. Co. v. Langdon, 24 Pick. 49, 52, 35 Am. Dec. 292; Russell v. McLellan, 14 Pick. 63, 69. Cf. Chesapeake, etc. Canal Co. v. Baltimore, etc. R. Co., 4 Gill & J. 1, 121.

<sup>22</sup> Russell v. McLellan (1833), 31 Mass. 63.

<sup>23</sup> Boston Glass Manufactory v. Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292.

corporation can never be without members, for the shares and franchises pass by assignment, bequest or descent, and so must belong to some person. The death of all the shareholders of such a corporation, cannot therefore terminate its existence.<sup>24</sup> The death or withdrawal of all the members of a non-stock corporation, or of so many that it is unable to continue its business, dissolves the corporation.<sup>25</sup> But as long as sufficient members remain to continue the business of the corporation, it will not be dissolved by death or withdrawal of its members.<sup>26</sup> There are many circumstances which, while they may constitute grounds for dissolution at the suit of the State, the corporate creditors, or shareholders, do not of themselves work a dissolution.<sup>27</sup> Where

<sup>24</sup> Russell v. McLellan, 31 Mass. 63; Newton Mfg. Co. v. White, 42 Ga. 148; Baldwin v. Canfield, 26 Minn. 43.

<sup>25</sup> Chésapeake, etc. Canal Co. v. Baltimore & O. R. Co., 4 Gill & J. (Md.) 1; Trustees, etc. v. Zanesville, etc. Co., 9 Ohio 203, 34 Am. Dec. 436; Blackwell v. State, 36 Ark. 178; Phillips v. Wickham, 1 Paige (N. Y.) 590.

<sup>26</sup> Blackwell v. State, 36 Ark. 178; McGinty v. Athol, etc. Co., 155 Mass. 183; *In re* Trustees, etc., 5 Ind. 77; Tomlinson v. Bricklayers' Union, 87 Ind. 308; State v. Societe Republicaine, 9 Mo. App. 114; Humphreys v. Stevens, 49 Ind. 491.

<sup>27</sup> E. g., the voluntary discontinuance of business. Nimmons v. Tappan, 2 Sweeney, 652; Nickles v. Rochester City Bank, 11 Paige, 118, 42 Am. Dec. 103; Troy, etc. R. Co. v. Kerr, 17 Barb. 581; Attorney-General v. Bank of Niagara, Hopk. Ch. 354. Nor is the mere non-user of its franchises. Russell v. McLellan, 14 Pick. 63; Brandon Iron Co. v. Gleason, 24 Vt. 228; Enfield T. B. Co. v. Connecticut River Co., 7 Conn. 28, 47. Cf. Pennsylvania, etc. Canal Co. v. Com'rs, etc. Co., 27 Ohio St. 22; Rorke v. Thomas, 36 N. Y. 559, 563; Hollingshead v. Woodward, 35 Hun, 410; Allen v. New Jersey So. R. Co., 49 How. Pr. 14; Kansas

City Hotel Co. v. Sauer, 65 Mo. 279, 288; Chouteau Ins. Co. v. Floyd, 74 Mo. 286, 290; State National Bank v. Robidoux, 57 Mo. 446; Moseby v. Burrow, 52 Tex. 396; State v. Barron, 58 N. H. 370; Harris v. Nesbit, 24 Ala. 398; Baptist Meeting-House v. Webb, 66 Me. 398; Rollins v. Clay, 33 Me. 132. Cf. *In re* Jackson Marine Ins. Co., 4 Sandf. Ch. 559; Conroy v. Gray, 4 How. P. 166. See also N. Y. Rev. Stat. 463, 464, §§ 38, 56. Nor is the company dissolved by being enjoined from carrying out the objects for which it was created. Kincaid v. Dwinelle, 59 N. Y. 548. See Sanborn v. Lef fert, 58 N. Y. 179. Companies duly incorporated by the legislature of Georgia under the constitution of 1868 did not forfeit their privileges by failing to organize until after the adoption of the constitution of 1877, there being no provision of law to that effect. Atlanta v. Gate City, etc. Co., 71 Ga. 106; Beach on Railways, § 587. A street railroad company does not forfeit its charter by requiring its employees to work more than ten hours a day, in violation of Laws N. Y. 1887, ch. 529, which provides that "it shall be a misdemeanor for any officer or agent of any such corporation [street railway company] to exact from any of its employees more than

the corporate property has been transferred to the stockholders, and there has been abandonment of the company's business with the general understanding among the stockholders that the company is dissolved,—this nevertheless does not constitute dissolution. Actions will still lie against the corporation.<sup>28</sup> A railroad corporation exists as a legal entity although all its property, including its franchise to operate the road, has been sold under mortgage, and it no longer holds meetings or elections of officers or directors.<sup>29</sup> Where a subscriber for stock in an organized corporation participated in a dividend, the corporation was at least *de facto*, and he was estopped to deny its corporate existence.<sup>30</sup>

*Dormant corporation.*—Though the corporation may have retired from business for a time, or have gone into the hands of a receiver, it is not thereby dissolved. It is only dormant, and still exists.<sup>31</sup> Unless by unanimous consent of the stockholders, there is no way, in the absence of statute, whereby either they or the creditors can dissolve the corporation. Only the State can question its right to exist.<sup>32</sup>

§ 1316. Possession of all the stock by one individual.—The ownership of all the shares by one person, does not dissolve the corporation.<sup>33</sup> "One-man" corporations have given the courts considerable trouble, but according to weight of authority, the fact, that all the shares have come into the possession of one person, does not work dissolution of the corporation, or make his continuance of business in the corporate name, a fraud upon the public.<sup>34</sup> But a sole stockholder, who wrongfully caused all of

ten hours' labor" per day. *People v. Atlantic Ave. R. Co.* (1890), 10 N. Y. S. 907.

<sup>28</sup> *Carnagnan v. Exporters,' etc.*, 11 N. Y. Supp. 172.

<sup>29</sup> *Willard v. Spartanburg, etc. Co.* (S. C. 1903), 124 Fed. 796.

<sup>30</sup> *Lincoln Park, etc. v. Swatek* (1903), 204 Ill. 228.

<sup>31</sup> *Parker v. Bethel Hotel Co.*, 96 Tenn. 352, 31 L. R. A. 706; *Reichwald v. Hotel Co.*, 106 Ill. 439.

<sup>32</sup> *Wheeler v. Pullman, etc. Co.*, 143 Ill. 197, 17 L. R. A. 818; *Sprague v. National Bank*, 172 Ill. 149, 42 L. R. A. 606, 64 Am. St. Rep. 17.

<sup>33</sup> *Newton Mfg. Co. v. White*, 42 Ga. 159; *Swift v. Smith*, 65 Md.

428, 57 Am. Rep. 336; *England v. Dearborn*, 141 Mass. 590; *Hopkins v. Roseclare, etc. Co.*, 72 Ill. 373; *Button v. Hoffman*, 61 Wis. 20, 50 Am. Rep. 131; *Sharp v. Dawes*, 46 L. T. Q. B. 104; *Louisville, etc. Co. v. Kaufman* (1898), 105 Ky. 131, 48 S. W. 434; *Parker v. Bethel Hotel Co.* (1896), 96 Tenn. 252, 31 L. R. A. 706.

<sup>34</sup> *Parker v. Bethel Hotel Co.*, 96 Tenn. 352, 31 L. R. A. 706; *Louisville Bank Co. v. Eisenman*, 94 Ky. 83, 42 Am. St. Rep. 335; *Louisville, etc. Co. v. Kauffman*, 105 Ky. 131, 48 S. W. 434; *Button v. Hoffman*, 61 Wis. 20, 50 Am. Rep. 131; *Baldwin v. Canfield*, 26 Minn. 43; *Main v. Mills*, 6 Biss. 98, Fed. Cas. No. 8,974; *First Nat.*

the corporate property to be transferred to himself, may be held responsible for the corporate debts.<sup>35</sup>

**§ 1317. Insolvency of the corporation.**—Insolvency and the appointment of a receiver do not constitute dissolution.<sup>36</sup> A national bank is not dissolved as a corporation from the mere fact that a receiver has been appointed.<sup>37</sup> Insolvent corporations, by statutory provisions of some States, may be compelled to go into liquidation, and have their business wound up at the suit of any creditor whose claim is presented in the manner required by the statute. This is the common procedure for winding up corporations. The appointment of a receiver by a court of equity does not dissolve the corporation.<sup>38</sup> Where a receiver was appointed, to take charge of a corporation, on the petition of the inspector of finance, setting forth that he believed the company was insolvent, and an injunction was also issued restraining the company from transacting any further business, and from all custody of, or interference with, its property until further order, the company in fact not being insolvent, except in its inability to meet its obligations in due course of business,—it was held that this was not a dissolution of the corporation.<sup>39</sup> But such a condition of affairs may constitute grounds for proceedings to dissolve by bill in equity,<sup>40</sup> filed either by the members of the company themselves,<sup>41</sup> or by corporate creditors.<sup>42</sup> While mere insolvency does not

Bank, etc. v. Winchester, 119 Ala. 168, 72 Am. St. Rep. 904.

<sup>35</sup> *Vide supra*, § 71a; *Angle v. Chicago, etc. R. Co.*, 151 U. S. 1. See the celebrated English case of *Broderip v. Salomon* (1895), 2 Chi. Div. 323; *Salomon v. Salomon, etc. Co.*, L. R. App. Cas. 22 (1897); *Montgomery v. Forbes*, 148 Mass. 249. See *Elliott on Pri. Corp.* 548, 549.

<sup>36</sup> *Vide supra*, §§ 1210-1211, INSOLVENCY; *Hasselman v. Japanese, etc. Co.* (1891), 2 Ind. App. 180.

<sup>37</sup> *Green v. Walkill Nat. Bank* (1876), 7 Hun, 63.

<sup>38</sup> *Thompson v. People*, 23 Wend. 537; *Parker v. Bethel Hotel, Co.*, 96 Tenn. 352, 31 L. R. A. 706; *Kincaid v. Dwinelle*, 59 N. Y. 548; *State v. Dist. Court (Mont.)*, 56 Pac. 219, 27 L. R. A. 392; *Mosebey v. Burrow*, 52 Tex. 396; *Na-*

tional Bank v. Deposit Co., 161 U. S. 1; *Hollingshead v. Woodward*, 107 U. S. 96; *Hutchison v. Crutcher*, 98 Tenn. 421; *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383; *City Ins. Co. v. Commercial Bank*, 68 Ill. 348; *Central Nat. Bank v. Connecticut, etc. Ins. Co.*, 104 U. S. 54; *Jackson v. McInnis*, 33 Oreg. 529, 72 Am. St. Rep. 755.

<sup>39</sup> *Dewey v. St. Albans Trust Co.*, 56 Vt. 476, 48 Am. Rep. 803.

<sup>40</sup> *Mickles v. Rochester City Bank*, 11 Paige, 118, 42 Am. Dec. 103; *Barclay v. Talman*, 4 Ed. Ch. 123.

<sup>41</sup> *Vide infra*, § 1313.

<sup>42</sup> "Judicial Procedure in Winding-Up and Liquidation of Companies," by A. G. Mackay, 23 Jour. Jur. 22; "Must a Winding-Up Creditor Realize his Security,"

necessarily in all cases constitute a ground upon which a court of equity will decree a dissolution,<sup>43</sup> and while the appointment of a receiver and sale of its property,<sup>44</sup> or even a judicial decree adjudging the company insolvent, is not equivalent to a dissolution,<sup>45</sup> there are, nevertheless, many cases in which, upon a showing that it would be to the best interests of all parties in interest, dissolution has been decreed in insolvency proceedings.<sup>46</sup> Where a petition for the voluntary dissolution of a corporation is brought, under the New York Code of Civil Procedure, it will be dismissed at the instance of any of the parties to the proceedings, and at any stage thereof, if it appears that the order to show cause is not in conformity to the statute, nor apprising those upon whom it is served of the nature of the proceedings, and that the petition fails to state facts showing that dissolution will be beneficial to the stockholders.<sup>47</sup>

45 L. T. 217; "Actions for Maliciously Petitioning For a Winding-Up," 17 Irish L. T. 110. Whether or not creditors other than judgment creditors can file such a bill is not well settled. Cole v. Knickerbocker Ins. Co., 23 Hun, 255; Belknap v. North America, etc. Ins. Co., 11 Hun, 282. In the provision of the New York Code of Civil Procedure, § 1785, relating to the dissolution of companies by proceedings by the attorney-general at the instance of creditors, the word is construed to mean judgment creditors. Cole v. Knickerbocker Life Ins. Co., 23 Hun, 255; Belknap v. North American Life Ins. Co., 11 Hun, 282; Paulsen v. Van Sleenburgh, 65 How. Pr. 342.

<sup>43</sup> Coburn v. Boston Mfg. Co., 10 Gray, 245; Nimmons v. Tappan, 2 Sweeney, 652; Moran v. Sydecker, 27 Hun, 582; New York, etc. Works v. Smith, 4 Duer, 362; Germantown Pass. Ry. Co. v. Fitler, 60 Pa. St. 124, 100 Am. Dec. 546; *In re Suburban Hotel Co.*, L. R. 2 Ch. 737.

<sup>44</sup> Dewey v. St. Albans Trust Co., 56 Vt. 476, 48 Am. Rep. 803; Ohio, etc. R. Co. v. Russell, 115

Ill. 52; State v. Merchant, 37 Ohio St. 251; People v. Barnett, 91 Ill. 422; Safford v. People, 85 Ill. 558, 560; National Bank v. Insurance Co., 104 U. S. 54; Second Nat. Bank v. New York Mfg. Co., 11 Fed. Rep. 532; Kincaid v. Dwinelle, 59 N. Y. 548, affirming 37 Super. Ct. Rep. 326, followed in Hollingshead v. Woodward, 35 Hun, 410; Huguenot Nat. Bank v. Studwell, 74 N. Y. 621, reversing 6 Daly, 13; Green v. Walkill Nat. Bank, 7 Hun, 63; Beach on Receivers, § 335.

<sup>45</sup> Second Nat. Bank v. New York, etc. Mfg. Co., 11 Fed. Rep. 532; Coburn v. Boston, etc. Mfg. Co., 10 Gray, 243; Moseby v. Burrow, 52 Tex. 396.

<sup>46</sup> Barclay v. Talman, 4 Edw. Ch. 123. See, also, *In re Factage Parisien*, 34 L. J. Ch. 140; Masters v. Eclectic Ins. Co., 6 Daly, 435; Hardon v. Newton, 14 Blatchf. 376; Hugh v. McRae, Chase's Dec. 466; "Judicial Procedure in Winding-Up and Liquidation of Companies," by A. J. G. Mackay, 23 Jour. Jur. 22.

<sup>47</sup> *In re Pyrolusite Manganeze Co.*, 29 Hun, 429.

**§ 1318. Statutory grounds and provisions for dissolution.—** New York and many other States by statute define the grounds for dissolution and designate the parties and proceedings for bringing a suit.<sup>48</sup> An American court has no jurisdiction to dissolve an English corporation, or enjoin its dissolution in accordance with English statutes.<sup>49</sup> The dissolution of corporations is, in most States, subject to statutory regulation, in which the methods of ending corporate life and settling corporate affairs, are fixed with a greater or less degree of detail.<sup>50</sup> In some States, abandonment or suspension for a time is made a cause for forfeiture, or dissolution.<sup>51</sup> As in Connecticut, where for abandonment of its business and neglect for a reasonable time to wind up the corporate affairs, it was held to be no defense to a decree of dissolution, although such abandonment was compelled by legal proceedings, and was not from free choice of the corporation.<sup>52</sup> And in New York, under statute making such suspension of business for more than a year ground for forfeiture of the corporate charter, where an insurance company resolved to suspend business and appointed a committee to manage its estate, and for more than a year afterwards failed to carry on the business of insurance,

<sup>48</sup> *Re Importers, etc. Exchange* (1892), 132 N. Y. 212; *Matter of Dolgeville, etc. Co.* (1899), 160 N. Y. 500; *Matter of Dittman* (1901), 65 N. Y. App. Div. 343; *Bixler v. Summerfield* (1902), 62 N. E. Rep. 849, 195 Ill. 147; *Watkins v. Lawrence, etc. Bank* (1893), 51 Kan. 254, 32 Pac. 514; *Cleveland, etc. Co. v. Taylor, etc. Co.* (1893), 54 Fed. 82; *McElroy v. Gladseen, etc. Co.* (1900), 126 Ala. 184; *Windmuller v. Standard Oil, etc. Co.* (1902), 115 Fed. 748.

<sup>49</sup> *Republican, etc. Mines v. Brown* (1893), 58 Fed. 644.

<sup>50</sup> New York, 1 Rev. Stat. 600; 2 Rev. Stat. 461, 484, §§ 39-41, 1784-1796, 2419-2431. In 1890 the general statutes of New York were revised by the Commissioners of Statutory Revision and passed by the legislature. See chapters 563-567 inclusive of the laws of 1890. See, also, the New Corporation Laws of the State of New York, by Frank White, with annotations

and references by Frank White and Edward J. Graham. *People v. Central City Bank*, 53 Barb. 412; *In re Pyrolusite Manganese Co.*, 29 Hun, 429; *In re Dubois*, 15 How. Pr. 7, *sub nom.* *In re Westchester Iron Co.*, 6 Abb. Pr. 386, notes; *Fisher v. World, etc. Ins. Co.*, 15 Abb. Pr. (N. S.) 363; *Mooney v. British, etc. Ins. Co.*, 9 Abb. Pr. (N. S.) 103; Ohio Act of May 1, 1852; Ill. Rev. Stat. 577, § 25; Iowa Code, § 1074; Ala. Code, § 1775 *et seq.*; *In re Franklin Telegraph Co.*, 119 Mass. 447; Mass. General Statutes, ch. 68, §§ 35-39; Pa. Brightley's Purdon's Digest, 197.

<sup>51</sup> *Swords v. Northern Light Oil Co.*, 17 Abb. N. C. (N. Y.) 115; *Kelsey v. Pfaudler, etc. Co.*, 45 Hun (N. Y.) 10; *People v. Northern R. Co.*, 53 Barb. (N. Y.) 98; *Conro v. Gray*, 4 How. Pr. (N. Y.) 166.

<sup>52</sup> *Hart v. Boston, etc. R. Co.*, 40 Conn. 524.

the corporation was adjudged to be dissolved, its officers, upon application of a stockholder, enjoined from exercising any of the corporate rights, and a receiver appointed to wind up its affairs.<sup>53</sup> And where in such case of statutory provision for action to dissolve the corporation, if it suspends business for a stated time, the action may not be brought until the lapse of such time.<sup>54</sup>

**§ 1319. Effect of dissolution. (a) Abatement of actions.**—The dissolution of a corporation, from whatever condition of law and fact, terminates the capacity of the corporate body to further exercise any of its powers, or franchises; and necessitates final settlement of the corporate obligations, and winding-up of its business; as, dissolution *ipso facto*, upon the happening of a prescribed contingency, or non-compliance with conditions subsequent in the charter or enabling act. At common law, all suits by or against a corporation are abated by its dissolution.<sup>55</sup> A judgment rendered against a corporation after its dissolution is void.<sup>56</sup> Pending attachment is dissolved by dissolution of the corporation.<sup>57</sup> Suits after dissolution are provided for by statute in many States.<sup>58</sup> A dissolution of a corporation does not take effect until final judgment of forfeiture or dissolution. First, as a formal consequence of dissolution, is the abatement of actions.<sup>59</sup>

<sup>53</sup> Ward v. Sea Ins. Co., 7 Paige (N. Y.), 294; *In re Jackson Marine Ins. Co.*, 4 Sandf. Ch. (N. Y.) 559.

<sup>54</sup> People v. Atlantic, etc. R. Co., 57 Hun (N. Y.), 378, 125 N. Y. 513; *Vide supra*, § 1294, GROUNDS FOR FORFEITURE.

<sup>55</sup> Logan v. Western, etc. R. R. (1891), 87 Ga. 523; Marion, etc. Co. v. Perry (1896), 74 Fed. 425; *Re Yuengling*, etc. Co. (1897), 24 N. Y. App. Div. 232; Walmsley v. Horton (1896), 12 N. Y. Div. 312; Grafton v. Union Ferry Co., 19 N. Y. Supp 960 (1892); Council, etc. Ry. v. Lawrence (1896), 3 Kan. App. 274, 45 Pac. 125.

<sup>56</sup> Rodgers v. Adriatic, etc. Co. (1895), 87 Hun, 384; Insurance Comr. v. United States, etc. Co. (1901), 22 R. I. 377; People v. Mercantile, etc. (1901), 65 N. Y. App. Div. 306.

<sup>57</sup> Morgan v. New York, etc. Assn. (1900), 73 Conn. 151.

<sup>58</sup> Marsteller v. Mills, 143 N. Y. 398 (1894); Huntingdon v. Chesapeake, etc. Ry. (1899), 98 Fed. 459; Stiles v. Laurel, etc. Co., 47 W. Va. 838 (1900), 35 S. E. 986; Fitts v. National, etc. Assn., 130 Ala. 413 (1901), 30 So. 374; Hammond v. National, etc. Assn., 31 N. Y. Misc. 182 (1900); Dundee, etc. Co. v. Hughes (1898), 89 Fed. 182; Boyd v. Hankinson (1899), 92 Fed. 49.

<sup>59</sup> National Bank v. Colby, 21 Wall. 609; Terry v. Merchants, etc. Bank, 66 Ga. 177; Thornton v. Marginal, etc. R. Co., 123 Mass. 32; McCullough v. Norwood, 58 N. Y. 562; Greeley v. Smith, 3 Story, 657, Fed. Cas. No. 5,749; Merrill v. Suffolk Bank, 31 Me. 57, 1 Am. Rep. 649; Ingraham v. Terry, 11 Humph. (Tenn.) 572; Mumma v. Potomac Co., 8 Pet. 281; Bank of Miss. v. Wrenn, 3 Sm. & M. (Miss.) 791; Farmers, etc. Bank v. Little, 8 W. & S.

"I cannot distinguish," said Mr. Justice Story, "between the case of a corporation and the case of a private person, dying *pendente lite*. In the latter case, the suit is abated at law, unless it is capable of being revived by the enactments of some statute, as is the case as to suits pending in the courts of the United States, where if the right of action survives, the personal representatives of the deceased party may appear and prosecute, or defend the suit. No such provision exists as to corporations; nor, indeed, could exist without reviving the corporation *pro hac vice*; and therefore, any suit, pending against it at its death, abates by mere operation of law."<sup>60</sup>

**§ 1320. Effect of dissolution upon judgment. Set-off. Statutes of limitations.**—Debts due by the stockholders to the corporation may be set off in the distribution of assets.<sup>61</sup> Dissolution stops the running of the statutes of limitations as held in New York,<sup>62</sup> but the contrary is held in the federal courts.<sup>63</sup> Afterwards, its attorneys are without power to enter into a stipulation in the suit, and a judgment entered therein is void.<sup>64</sup> Judgments against a corporation rendered upon process issued after it ceased to exist, are of no validity, and may be impeached by a party interested in the administration of its assets.<sup>65</sup> A judgment rendered after dissolution, although upon action brought ante-

(Pa.) 207; May v. State Bank, 2 Rob. (Va.) 56; Taylor v. Gray, 50 N. J. Eq. 621; Insurance Comr. v. U. S. Fire Ins. Co., 22 R. I. 377; Pendleton v. Russell, 144 U. S. 645; Dundee v. Hughes, 77 Fed. 855; Nelson v. Hubbard, 96 Ala. 238, 17 L. R. A. 375; Morgan v. New York Nat., etc. Assn., 73 Conn. 151; Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412; Life Assn. of American v. Fassett, 102 Ill. 315; District of Clay v. District of Buchanan, 63 Iowa, 188; Kansas, etc. Co. v. Kelsey, 23 Kan. 632; Bowker v. Hill, 60 Me. 172, 115 Fed. 528.

<sup>60</sup> Sturgis v. Drew, 11 Hun, 136; Fox v. Horah, 1 Ired. Eq. 358, 36 Am. Dec. 48; Farmers, etc. Bank v. Little, 8 Watts & S. 207, 42 Am. Dec. 293; Cooper v. Oriental, etc. Assn., 100 Pa. St. 402; Life Assn., etc. v. Goods, 71 Tex. 90; May v. State Bank, 2 Rob. 56, 40 Am. Dec.

726; Combes v. Keyes, 89 Wis. 297, 27 L. R. A. 369, 46 Am. St. Rep. 839.

<sup>61</sup> Richardson v. Wallace, 39 S. C. 216 (1893), 17 S. E. 725.

<sup>62</sup> Ludington v. Thompson, 153 N. Y. 499 (1897).

<sup>63</sup> Bradley, etc. Co. v. Norfolk, etc. Co. (1900), 101 Fed. 631.

<sup>64</sup> *In re Norwood*, 32 Hun (N. Y.), 196; Saltmarsh v. Planters' etc. Bank, 17 Ala. 761; Bank of Louisiana v. Wilson, 19 La. Ann. 1; Miami Exporting Co. v. Gano, 13 Ohio, 269; City Ins. Co. v. Commercial Bank, 68 Ill. 348, 354; Greeley v. Smith, 3 Story, C. C. 657; Ingraham v. Terry, 11 Humph. 572; Carey v. Giles, 10 Ga. 9; Merrill v. Suffolk Bank, 31 Me. 57, 50 Am. Dec. 649.

<sup>65</sup> Dobson v. Simonton, 86 N. C. 492; Merrill v. Suffolk Bank, 31 Me. 57.

cedent thereto, is absolutely void, in the absence of statutory provision to the contrary, as in case of a judgment against a natural person after his death;<sup>66</sup> but bond of appeal by the corporation from judgment of forfeiture or dissolution is valid, although the judgment is affirmed; and a judgment rendered against the corporation pending such appeal is valid, although the judgment of forfeiture is affirmed. A judgment rendered against a dissolved corporation is valid,—if rendered pending its appeal for a judgment of forfeiture of its charter, and before final decree of affirmance.<sup>67</sup>

**§ 1321. Effect upon attachment for debt. Bankruptcy.**  
**Transfer of stock. Right of action for torts.**—No attachment for debt will lie against a dissolved corporation. Dissolution of a corporation, voluntary or involuntary, as by expiration of its term of existence, or by decree of forfeiture, any time before judgment in pending attachment proceedings against the corporation,—will dissolve the attachment.<sup>68</sup>

**Bankruptcy.**—Although a State court has entered decree of dissolution against a corporation, and has appointed a receiver to administer its assets, the corporation may be proceeded against in bankruptcy, under the Federal Bankruptcy Law.<sup>69</sup> Dissolution of the corporation does not affect any prior *bona fide* transfer of shares of its stock. No legal title passes to the stock by transfer subsequent to dissolution, but such sale will transfer to the buyer, the seller's interest in the corporate assets in excess of his debts to the corporation.<sup>70</sup> But a Missouri corporation, having real estate in Illinois, was sued in the latter State, and the real estate attached. Afterwards the corporation was dissolved, and its affairs put into

<sup>66</sup> Marion, etc. Co. v. Perry, 74 Fed. 425, 41 U. S. App. 14, 33 L. R. A. 252; Thornton v. Marginal, etc. R. Co., 123 Mass. 32; Krutz v. Paoli Town, 20 Kan. 397; Mumma v. Potomac Co., 8 Pet. (U. S.) 281; Combes v. Keyes, 89 Wis. 297, 27 L. R. A. 369, 46 Am. St. Rep. 839; National Bank v. Colby, 21 Wall. 614; Merrill v. Suffolk Bank, 31 Me. 57, 50 Am. Dec. 649; Sturgis v. Vanderbilt, 73 N. Y. 384; Life Assn. of America v. Fasset, 102 Ill. 315; Rankin v. Sherwood, 33 Me. 509; District of Clay v. District of Buchanan, 63 Iowa, 188.

<sup>67</sup> Giles v. Stanton, 86 Tex. 620, 26 S. W. 615; Texas Trunk Ry. Co. v. Jackson, 85 Tex. 605, 22 S. W. 1030.

<sup>68</sup> Morgan v. New York, etc. Assn., 73 Conn. 151; Farmers' etc. Bank v. Little, 8 Watts & S. (Pa.) 207, 42 Am. Dec. 293.

<sup>69</sup> Platt v. Archer, 9 Blatchf. 559, Fed. Cas. 11,213; *In re Independent Ins. Co.*, 1 Holmes, 103, Fed. Cas. 7,017; *Vide supra*, §§ 1211, 1212, BANKRUPTCY OF THE CORPORATION.

<sup>70</sup> James v. Woodruff, 10 Paige, 541, 2 Denio, 574.

the hands of a receiver in Missouri, and it was held that the suit would not thereby be defeated, especially as the decree dissolving the corporation provided that suits might be brought and defended in the name of the corporation.<sup>71</sup> The several statutes relating to the dissolution and winding up of corporations, generally provide, however, for a continuance of the capacity to sue and be sued, so that their assets may be collected and claims against them may be enforced.<sup>72</sup> And receivers are sometimes appointed for this purpose.<sup>73</sup> At common law, no right of action for tort, survives the dissolution of a corporation. The only remedy is against the individuals who committed the wrong.<sup>74</sup> It is otherwise held under statutory provisions, as, under a New York statute it was held that the right of action survived against a corporation for personal injuries; and in West Virginia a private business corporation which fails to wind up its business when its charter expires, but continues in its charter name to carry on its

<sup>71</sup> Life Assn. of America v. Fassett, 102 Ill. 315.

<sup>72</sup> Foster v. Essex Bank, 16 Mass. 245; Merrill v. Suffolk Bank, 31 Me. 57, 50 Am. Dec. 649; Miller v. Newburg Orrel Coal Co. (1889), 31 W. Va. 836; Crease v. Babcock, 10 Met. 525, 567; Golger v. Chase, 18 Pick. 63; Tuscaloosa, etc. Assn. v. Green, 48 Ala. 346; Thornton v. Marginal Freight Ry. Co., 123 Mass. 32; Mariners' Bank v. Sewall, 30 Me. 220; Franklin Bank v. Cooper, 36 Me. 179; Stetson v. City Bank, 12 Ohio St. 577; Muscatine Turn Verein v. Funk, 18 Iowa, 469; 1 How. Stat. (Mich.) 1244, § 4867; McGoon v. Scales, 9 Wall. 23; *In re Independent Ins. Co.*, 1 Holmes, 103; Masson v. Pemwabic Mining Co., 25 Fed. Rep. 882; Nevitt v. Bank of Port Gibson, 14 Miss. 513; Van Glahn v. De Rosset, 81 N. C. 467; Michigan State Bank v. Gardner, 15 Gray, 362; Blake v. Portsmouth, etc. R. Co., 39 N. H. 435; Herron v. Vance, 17 Ind. 595. In West Virginia it is said that at common law, when a corporation ceased to exist by expiration of its charter, or by its dissolution by a forfeiture of its charter, judicially ascer-

tained and declared, or in any other manner, all suits for or against it abated. But this is not now the law; the common law on this subject having been repealed by statute. A suit by or against a private corporation cannot be abated or dismissed because the corporation has been dissolved by a forfeiture of its charter, so judicially ascertained or declared, or by its dissolution in any other manner. Greenbrier Lumber Co. v. Ward (1887), 30 W. Va. 43, 3 S. E. Rep. 227.

<sup>73</sup> Lothrop v. Stedman, 13 Blatchf. 134, 143; Owen v. Smith, 31 Barb. 641; Van Glahn v. De Rosset, 81 N. C. 467; Life Assn. v. Fassett, 102 Ill. 315, where it was said that if the corporation were to be regarded as really defunct, so as to defeat the suit against it, a writ of error brought with that purpose would have to be dismissed, if brought in the name of the corporation, as, if defunct, the writ should be prosecuted in the receiver's name.

<sup>74</sup> Marstatler v. Mills, 143 N. Y. 398; Hepworth v. Union Ferry Co., 62 Hun (N. Y.) 257; People v. Troy, etc. Co., 82 Hun (N. Y.), 303.

corporate business, may be sued in its corporate name, for a tort committed by it after the expiration of its charter.<sup>75</sup> The company in this case was held to be a corporation *de facto*. But, after expiration of its charter, a corporation has not even a *de facto* corporate existence.<sup>76</sup>

**§ 1322. Effect upon debts. Franchises. Choses in action.** At common law the rule was, that the dissolution of a corporation extinguished all debts due to or by the corporation; and, though so held in a few cases in this country,<sup>77</sup> that doctrine is obsolete in most States, the rule being abolished by statute.<sup>78</sup> In the absence of such statute, and there being no remedy at law in such cases of dissolution, a court of equity will appoint a receiver to collect the assets of the corporation, and pay its debts.<sup>79</sup> Not only is the franchise to be a corporation extinguished by dissolution, but also the right, of the corporation to exercise any other of its corporate franchises, is extinguished.<sup>80</sup> "One obvious effect of the repeal of a statute is that it no longer exists. Its life is at an end. Whatever force the law may give to transactions into which the corporation entered, and which were authorized by the charter while in force, it can originate no new transactionis, dependent on the power conferred by the charter. If the corporation be a bank, with power to lend money, and to issue circulating notes, it can make no new loan, nor issue any new notes, designed to circulate as money. If the essence of the grant of the charter be to operate

<sup>75</sup> Miller v. Newburg Orrel Coal Co. (1889), 31 W. Va. 836, holding also that in such a case a plea that the charter of the corporation had expired, and that it had ceased to exist in law at the time the alleged cause of action arose, will be held bad, because it does not also aver that the corporation had wound up its business and ceased to exist in fact as well as in law.

<sup>76</sup> Bradley v. Reppell, 133 Mo. 545, 54 Am. St. Rep. 685.

<sup>77</sup> Rider v. Nelson, etc. Factory, 7 Leigh (Pa.), 156, 30 Am. Dec. 495; Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412; Robinson v. Lane, 19 Ga. 337; Bank of Miss. v. Duncan, 56 Miss. 166; Fox v. Horah, 1 Ired. (N. C.) 358, 36 Am.

Dec. 48; Exchange Bank, etc. v. Tiddy, 67 N. C. 169.

<sup>78</sup> Bacon v. Robertson, 18 How. (U. S.) 480; Curran v. State, 15 How. 310; People v. National Trust Co., 82 N. Y. 283; Tiffin Glass Co. v. Stoehr, 54 Ohio St. 157; City Ins. Co., etc. v. Commercial Bank, etc., 68 Ill. 348; Panhandle, etc. v. Emery, 78 Tex. 498, 15 S. W. 23.

<sup>79</sup> Foster v. Essex Bank, 16 Mass. 245, 8 Am. Dec. 135; Mumma v. Potomac, 8 Pet. (U. S.) 281; Franklin Bank v. Cooper, 36 Me. 179; Tuscalooso, etc. Assn. v. Green, 48 Ala. 346.

<sup>80</sup> Greenwood v. Union Freight R. Co., 105 U. S. 13; People v. O'Brien, 45 Hun (N. Y.), 519, 111 N. Y. 1, 7 Am. St. Rep. 684.

a railroad, and to use the streets of the city for that purpose, it can no longer so use the streets of the city, and no longer exercise the franchise of running a railroad in the city. In short, whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the State, is abrogated by repeal of the law which granted these special rights.<sup>81</sup> Where before dissolution, the corporate franchise has been held, under legislative authority, transferred to an individual, the fact of dissolution is held not material, in a suit by the transferee for violation of his transferred rights.<sup>82</sup> Debts due the corporation, franchises and *choses in action*, are not destroyed by a dissolution and may be enforced and utilized for the benefit of those interested,<sup>83</sup> although the corporation may not sue in its own name.<sup>84</sup> Thus the property of a religious corporation, dissolved by reason of the expiration of its charter, vests in its members, who may reincorporate; and the new corporation may sue for breach of a condition relating to the premises, especially where it has been in possession and managed the property without objection for many years.<sup>85</sup> So a franchise to construct and maintain a street railway (which is not a mere license but an indestructible legislative authority and property in the highest sense of the term), upon the dissolution of the corporation holding it, becomes vested in the directors then in office or those having control of the business of the corporation, in trust for creditors and stockholders.<sup>86</sup> A lease to a corporation is not terminated by its dissolution.<sup>87</sup>

<sup>81</sup> Greenwood v. Union Freight R. Co., 105 U. S. 13.

<sup>82</sup> Clow v. Van Loan, 6 Thomp. (N. Y.) 458.

<sup>83</sup> Greenwood v. Union Freight Co., 105 U. S. 13; People v. O'Brien (1888), 111 N. Y. 1; Read v. Frankfort Bank, 23 Me. 318. Cf. People v. Nat. Trust Co., 82 N. Y. 283; "Effect of Winding-Up on a Company's Contracts," 50 L. T. 292.

<sup>84</sup> Bank of Louisiana v. Wilson, 19 La. Ann. 1. Cf. Greely v. Smith, 3 Story, 657.

<sup>85</sup> Congregation of the Roman Catholic Church v. Texas & P. Ry. Co. (1890), 41 Fed. Rep. 564.

<sup>86</sup> People v. O'Brien (1888), 111

N. Y. 1. Under Gen. Stat. Colo. § 240, empowering a corporation to convey its property; and sections 341, 342, by which its property, on dissolution, passes to its directors, instead of reverting,—the right of way of a ditch company does not cease with the expiration of its charter, but, having previously been conveyed, its grantee may thereafter continue the use of the same. Bailey v. Platte, etc. Co., 12 Colo. 230, 21 Pac. Rep. 35, De France, C., dissenting.

<sup>87</sup> People v. National Trust Co., 82 N. Y. 283. For a full discussion of this subject see note to People v. O'Brien, 7 Am. St. Rep. 717.

**§ 1323. Effect upon contracts.**—In the absence of statutory provision to the contrary, or in the contract, preferred stockholders have no priority over holders of common stock, upon dissolution of the corporation and distribution of its property. The preferred stockholder's right to preference over holders of common stock—is in the dividends of profits, and not in the capital stock itself, or in distribution of the corporate assets.<sup>88</sup> Upon dissolution, all the corporate property is subject first to payment of the corporate debts. The remainder of the assets are distributed *pro rata* among the stockholders.<sup>89</sup> After dissolution, the corporation can make no deed for land; any such deed is void.<sup>90</sup> But under statute allowing certain time to wind up its business, a dissolved corporation may convey its land to a trustee for that purpose.<sup>91</sup> Dissolution does not extinguish a contract of a waterworks company with the city. It survives to the stockholders.<sup>92</sup> A corporation may make a contract for a period beyond that of its corporate existence. Dissolution of a railroad corporation does not extinguish its contract with another for joint use of its tracks.<sup>93</sup> Upon dissolution, dividends are to be paid to the certificate holder whether or not he is registered as a holder.<sup>94</sup> Non-resident stockholders share equally with resident, upon final distribution of assets.<sup>95</sup> The obligations of a corporation upon its contracts do not cease upon its dissolution.<sup>96</sup> Contracts of employment, for a period longer than the duration of the charter, are not terminated by dissolution.<sup>97</sup> Upon dissolution a mortgage can not be foreclosed, but the court may deliver possession of the mortgaged property to the mortgage trustees as provided in the mortgage.<sup>98</sup> Volun-

<sup>88</sup> Sumrall v. Commercial Bldg., etc. (Ky. 1899), 50 S. W. 69, 44 L. R. A. 659; Forwood v. Eubank (Ky. 1899), 50 S. W. 255; Coltrane v. Baltimore, etc. Assn., 110 Fed. 281 (1901).

<sup>89</sup> San Mateo County v. Southern Pac. R. R. (1882), 8 Sawyer, 238.

<sup>90</sup> Marysville, etc. Co. v. Munson (1890), 44 Kan. 491, 24 Pac. 977; Bradley v. Reppell (1896), 133 Mo. 545.

<sup>91</sup> Hanan v. Sage (1893), 58 Fed. 651.

<sup>92</sup> Weatherly v. Capital, etc. Co. (1897), 115 Ala. 156, 22 So. 140.

<sup>93</sup> Union, etc. Ry. v. Chicago, etc. Ry. (1896), 163 U. S. 564.

<sup>94</sup> Bath Sav. Inst. v. Sagadahoc Nat. Bank (1897), 89 Me. 500.

<sup>95</sup> Blake v. McClung (1900), 176 U. S. 59.

<sup>96</sup> Shayne v. Evening Post, etc. Co. (1901), 168 N. Y. 70, 55 L. R. A. 777, 85 Am. St. Rep. 654; Tiffin Glass Co. v. Stoehr (1896), 54 Ohio, 157; Rosenbaum v. United States, etc. Co. (1898), 61 N. J. L. 543.

<sup>97</sup> Kinsman v. Fisk (1899), 37 N. Y. App. Div. 443; Globe, etc. Co. v. Jones (Mich. 1902), 89 N. W. 580.

<sup>98</sup> Nelson v. Hubbard (1892), 96 Ala. 238, 11 So. 428, 17 L. R. A. 375.

tary dissolution does not extinguish the contractual liabilities of a corporation. This rule in some courts has been applied to involuntary dissolution.<sup>1</sup> Though no specific performance of the contract can be had, the corporate liability to damages for non-performance may be enforced in equity against the assets of the corporation.<sup>2</sup> The statutory trustees, of a dissolved water company were held to the continued performance of the company's contract to supply a city with water,<sup>3</sup> and it was held that a railroad lease was not terminated by the mere appointment of a receiver, nor until final judgment of dissolution.<sup>4</sup> A contract is discharged and further performance excused, when rendered impossible by change in the law.. As where the State enjoined continuance of the business of the corporation, the salary was held discontinued in the case of a corporation employe, at a fixed salary for a definite term of years.<sup>5</sup> A corporation after dissolution, cannot become a party to any contract, as in case of a note, executed to a corporation after its dissolution,—is void for want of a payee,<sup>6</sup> and an offer made to the corporation, before dissolution, can not be accepted by it afterwards.<sup>7</sup> Any participating stockholder or member of a dissolved corporation, will be liable as partner, upon any contract made in the course of corporate business continued after dissolution.<sup>8</sup> Nearly all the States have adopted statutes for the protection of the rights of creditors and shareholders in case of dissolution of the corporation, either by continuing its existence for a sufficient time to wind up its affairs, or by making for that purpose its officers, trustees, or by appointment of a receiver, and allowing suits by or against them or him. Such statutes overcome the difficulty presented by the common-law rule, preventing actions by or against a dissolved corporation, which rule necessitated resort to a court of equity.<sup>9</sup> It is held

<sup>1</sup> People v. National Trust Co., 82 N. Y. 283; Griffith v. Blackwater, etc. Co., 46 W. Va. 56, 33 S. E. 125; Shields v. Ohio, 95 U. S. 319; Schleider v. Dillman, 44 La. Ann. 462, 10 So. 934.

<sup>2</sup> Schleider v. Dillman, 44 La. Ann. 462, 10 So. 934.

<sup>3</sup> Weatherly v. Capitol, etc. Co., 115 Ala. 186, 22 So. 140.

<sup>4</sup> New York Elevated R. Co. v. Manhattan Ry. Co., 63 How. Pr. (N. Y.) 14.

<sup>5</sup> Rosenbaum v. United States,

etc. Co., 61 N. J. Law, 543, reversing 60 N. J. L. 294; Bank of Salem v. Caldwell, 16 Ind. 469.

<sup>6</sup> Saltmarsh v. Planter, etc. Bank, 17 Ala. 761, 14 Ala. 668; White v. Campbell, 5 Humph. 333.

<sup>7</sup> Goodspeed v. Wiard Plough Co., 45 Mich. 322.

<sup>8</sup> National Union Bank of Watertown v. Landon, 45 N. Y. 410.

<sup>9</sup> Warner v. Calendar, 20 Ohio St. 190; Schmidt Bros. Co. v. Mahony, 60 Neb. 20, 82 N. W. 99;

that such statutes are not unconstitutional.<sup>9</sup> Upon the dissolution of a company, whether by repeal of its charter,<sup>10</sup> or by forfeiture or insolvency or any other means, the stockholders are entitled to share in the surplus assets—remaining after the claims of creditors have been satisfied,—in proportion to the amounts contributed by them to the capital stock.<sup>11</sup> In the case of building associations, after creditors' claims and the expenses incident to the administration of the assets have been paid, the residue is to be distributed among those whose claims are based on the stock of the association, whether they have withdrawn and hold orders for the withdrawal value of their stock, or not.<sup>12</sup> After dissolution the corporate property is to be treated as partnership assets and divided accordingly.<sup>13</sup> And directors who conduct the business of the corporation after expiration of its charter, without attempting to wind it up, may be required to account in a proceeding by stockholders to wind up the affairs of the corporation.<sup>14</sup> A majority of the shareholders have no right to buy in the property, at an unfair valuation to the prejudice of the minority; and where they have

*Stetson v. City Bank of New Orleans*, 2 Ohio St. 167; *Richmond, etc. Co. v. New York, etc. Co.*, 95 Va. 386; *Wehn v. Fall*, 55 Neb. 547.

<sup>9</sup> *Mumma v. Potomac Co.*, 8 Pet. (U. S.) 281; *Foster v. Essex Bank*, 16 Mass. 245, 8 Am. Dec. 135; *Franklin Bank v. Cooper*, 36 Me. 179.

<sup>10</sup> *Lothrop v. Stedman*, 13 Blatchf. 134.

<sup>11</sup> *Krebs v. Carlisle Bank*, 2 Wall. C. C. 33; *Shorb v. Beaudry*, 56 Cal. 446; *McVicker v. Ross*, 55 Barb. 247; *Taylor v. Earl*, 8 Hun, 1; *Frothingham v. Barney*, 6 Hun, 336; *In re Bridgewater Nav. Co.* (Ch. Div. 1887), 3 Ry. & Corp. L. J. 591; *Fesh v. Nebraska City, etc. Co.*, 25 Fed. Rep. 795; *Wood v. Dummer*, 3 Mason, 308, 322; *Burrall v. Bushwick R. Co.*, 75 N. Y. 211; *Heath v. Barmore*, 50 N. Y. 302; *Dudley v. Price*, 10 B. Mon. 84; *James v. Woodruff*, 10 Paige, 541, affirmed 2 Denio, 574; *Bank of Commerce's Appeal*, 73 Pa. St. 59; *Chappell's Case*, L. R. 6 Ch. 902; *Callanan v. Edwards*,

32 N. Y. 483; *Sewall v. Chamberlain*, 16 Gray, 501; *Hart v. Boston, etc. R. Co.*, 40 Conn. 524; *Graham v. Boston, etc. R. Co.*, 118 U. S. 161; *Covington, etc. Bridge Co. v. Meyer*, 31 Ohio St. 319, 325; *McGregor v. Home Ins. Co.*, 33 N. J. Eq. 181; *In re London, etc. Co.*, L. R. 5 Eq. 519. But see *Griffith v. Paget*, 6 Ch. Div. 511; *Bangor, etc. Co.*, L. R. 20 Eq. 59. Cf. *Thornton v. Marginal Freight Ry. Co.*, 123 Mass. 32; *Nathan v. Whitlock*, 9 Paige, 152; *Lea v. American, Atlantic, etc. Canal Co.*, 3 Abb. Pr. (N. S.) 1; *Curren v. State*, 15 How. 304, 307; *Hastings v. Drew*, 76 N. Y. 9, affirming 50 How. Pr. 254; *Wilde v. Jenkins*, 4 Paige, 481; *Appeal of Huston*, 127 Pa. St. 620 (1889), 18 Atl. Rep. 419.

<sup>12</sup> *Christian's Appeal*, 102 Pa. St. 184.

<sup>13</sup> *Shorb v. Beaudry*, 56 Cal. 446.

<sup>14</sup> *Mason v. Pewabic Mining Co.* (1890), 133 U. S. 50, 7 Ry. & Corp. L. J. 252. Cf. *Young v. Moses*, 53 Ga. 628.

done so, equity will grant them no relief for losses incurred in the transaction.<sup>15</sup>

**§ 1324. Receivers for dissolved corporations.**—The mere fact that a corporation has been dissolved, does not in every instance give the minority stockholders the right to have a receiver appointed and the assets sold, as there may be circumstances which will justify a court of equity in ascertaining the value of the assets without a sale, and in making a distribution to the members on that basis.<sup>16</sup> When directors and officers of the defunct corporation are, by statute, made trustees of the assets for the benefit of creditors, as is the case in some States,<sup>17</sup> the business of settling its affairs can not be taken from them and put into a receiver's hands, unless there has been fraud on their part.<sup>18</sup> When a receiver has been appointed, the title to all the company's property vests in him as trustee for the benefit of creditors and stockholders.<sup>19</sup>

**§ 1325. Enforcement of creditors' claims after dissolution.**—The creditors of a corporation can not prevent a dissolution. They are not parties to the charter contract, or franchises granted by the State. It may dissolve them without impairing any rights of creditors. "We are of the opinion that the dissolution of a corporation (even supposing the act of confirmation of Congress out of the way) can not in any just sense be considered, within the clause of the Constitution of the United States on this subject,

<sup>15</sup> Ervin v. Oregon Ry. & Nav. Co., 27 Fed. Rep. 625, 28 Fed. Rep. 833. In this case the owners of a majority of the stock of a corporation, under the form of dissolving it and disposing of its property and distributing the proceeds, became the purchasers of the property at an unfair price, through a new corporation, in which they were stockholders, to the exclusion of the minority shareholders in the old corporation. In a suit in equity by the latter against the new corporation it was held that they had no equitable lien to the extent of the moneys of which they had been deprived by the sale on the property of the old corporation in the hands of the new corporation.

<sup>16</sup> Baltimore, etc. R. Co. v. Can-

non (1890), 72 Md. 493, 8 Ry. & Corp. L. J. 358.

<sup>17</sup> E. g. N. Y. Laws of 1890, ch. 563, §§ 19, 20; Central City Savings Bank v. Waller, 66 N. Y. 424, 428; Frothingham v. Barney, 6 Hun, 366, 372; Towar v. Hale, 46 Barb. 361, 365; Paola Town Co. v. Krutz, 22 Kan. 728. See Bliss v. Matteson, 45 N. Y. 22.

<sup>18</sup> Follett v. Field, 30 La. Ann. 161.

<sup>19</sup> Bacon v. Robertson, 18 How. 480; Heath v. Barmore, 50 N. Y. 302; Owen v. Smith, 31 Barb. 641; Towar v. Hale, 46 Barb. 361; Life Assn. v. Fassett, 102 Ill. 315, 323; People v. College of California, 38 Cal. 166. *Vide supra*, § 1225, RECEIVERS FOR DISSOLVED CORPORATIONS.

an impairing of the obligation of the contracts of the company by those States, any more than the death of a private person can be said to impair the obligation of his contracts. The obligation of those contracts survive, and the creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of *bona fide* purchasers, but is still held in trust for the company, or for the stockholders thereof at the time of dissolution, in any mode permitted by the local laws.

. . . . A corporation, by the very terms and nature of its political existence, is subject to dissolution, by a surrender of its corporate franchises, and by a forfeiture of them for wilful misuser and nonuser. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. And it would be a doctrine new in the law, that the existence of a private contract of a corporation should force upon it a perpetuity of existence contrary to public policy, and the nature and object of its charter.”<sup>20</sup> But the rights of the creditors in a court of equity, to have the corporate property first applied to the satisfaction of their claims, before any distribution among the stockholders, is superior to any rights of the shareholders or of their assigns.<sup>21</sup>

**§ 1326. Distribution of assets among shareholders.**—In the distribution of assets of a dissolved corporation, after the appointment of a receiver, no one creditor can gain priority over any other one.<sup>22</sup> Equity will enforce collection of a corporation’s debts, after dissolution and after the expiration of the time within which a suit at law should have been brought.<sup>23</sup> The doctrine, that the

<sup>20</sup> Justice Story in *Mumma v. Potomac Co.*, 8 Pet. 286; *Smith v. Chesapeake, etc. Canal Co.*, 14 Pet. 45; *Curran v. State*, 15 How. 310; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574; *Mobile, etc. Co. v. State*, 29 Ala. 586.

<sup>21</sup> *Bacon v. Robertson*, 18 How. (U. S.) 480; *State v. Commercial State Bank*, 28 Neb. 677.

<sup>22</sup> *Marr v. Bank of West Tenn.*, 4 Coldw. (Tenn.) 471; *Clinkscates v. Pendleton Mfg. Co.*, 9 S. C. 318; *Hadley v. Freedman’s, etc. Co.*, 2 Tenn. Ch. 122; *Roseboom v. Whitaker*, 132 Ill. 81; *Cowan v. Pennsylvania, etc. Co.*, 184 Pa. St. 1;

*Dean & Son’s Appeal*, 98 Pa. St. 101.

<sup>23</sup> *Howe v. Robinson*, 20 Fla. 352. Cf. *Effect of Winding-up on a Company’s Contracts*, 50 L. T. 292. See, also, *Hewett v. Hatch*, 57 Vt. 16; *Rundel v. Life Assn. of America*, 4 Woods, C. Ct. 94; *Hampstead Bldg. Assn. v. King*, 58 Md. 279; *State Council v. Sharp*, 38 N. J. Eq. 24; *Hibernia Fire Engine Co. v. Commonwealth*, 93 Pa. St. 264; *People v. Cohocton Stone Road*, 25 Hun, 13; *Life Assn. of America v. Fassett*, 102 Ill. 315. But see *Gray v. National S. S. Co.*, 115 U. S. 116, as to claims for personal injuries.

capital stock and assets of a corporation constitute a trust fund for the benefit of creditors, is especially applicable to insolvent and dissolved corporations, and has been generally recognized in this country,<sup>24</sup>—except in a comparatively few instances in which the English rule that the property in such a case reverts to the king or to the original grantors, was upheld.<sup>25</sup> It is a rule, well-settled, and generally observed, that the death of a corporation leaves unimpaired the rights of creditors to its property in payment of their debts<sup>26</sup>—in whatever manner the dissolution may have been brought about.<sup>27</sup> Thus the fact that a corporation has been ousted by a judgment in *quo warranto* proceedings, does not affect the right of the creditors, nor the liability of the stockholders.<sup>28</sup> Where, on the dissolution of an insurance company, the receiver reported the total indebtedness of the company, all the premium notes held by it, the losses and expenses, and the percentage of assessments each

<sup>24</sup> Bacon v. Robertson, 18 How. (U. S.) 480; State v. Commercial State Bank, 28 Neb. 677.

<sup>25</sup> Titcomb v. Kennebunk Mut. Fire Ins. Co., 79 Me. 305; Late Corporation of Church of Jesus Christ v. United States, 136 U. S. 1; People v. Trustees of College of California, 38 Cal. 166; Mott v. Danville Seminary, 129 Ill. 403; Danville Seminary v. Mott, 136 Ill. 289.

<sup>26</sup> Greenwood v. Union Freight Co., 105 U. S. 13; Terrett v. Taylor, 9 Cranch, 43; Fisk v. Union Pac. R. Co., 10 Blatchf. 518; Tinkham v. Borst, 31 Barb. 407; Curran v. Arkansas, 15 How. 304; Mumma v. Potomac Co., 8 Pet. 281; Life Assn. v. Fassett, 102 Ill. 315, 323; McCoy v. Farmer, 65 Mo. 244. In an action to dissolve a manufacturing corporation, the referee, in pursuance of 2 N. Y. Rev. Stat. 469, § 73, reported that two stockholders had assets in their hands which, so far as was necessary to pay debts and produce equality of distribution, they had no right to retain, whereto no exceptions were filed; the receiver, instead of entering final judgment thereon, made up his account and filed a petition reporting the

precise amount they should pay, and praying they be adjudged to pay accordingly; a copy whereof was served on them, and they appeared and had full opportunity to be heard; and it was held that the irregularity was no ground for reversal of the judgment against them. People v. Hydrostatic Paper Co., 88 N. Y. 623.

<sup>27</sup> Rowland v. Meader Furniture Co. (1883), 38 Ohio St. 269; McCoy v. Farmer, 65 Mo. 244; Howe v. Robinson, 20 Fla. 352; Thornton v. Marginal Freight Ry. Co., 123 Mass. 32; Blake v. Portsmouth, etc. R. Co., 39 N. H. 435; Lum v. Robertson, 6 Wall. 277; Bacon v. Robertson, 18 How. 480. Cf. McGoan v. Scales, 9 Wall. 23; Robinson v. Lane, 19 Ga. 337; Fox v. Horah, 1 Ired. Eq. 358, 36 Am. Dec. 48; Malloy v. Mallett, 6 Jones Eq. 345; Port Gibson v. Moore, 21 Miss. 157; Bank of Mississippi v. Duncan, 56 Miss. 166, 173. See, however, Erie, etc. R. Co. v. Casey, 26 Pa. St. 287; Colchester v. Seaber, 3 Burr. 1866; Commercial Bank v. Lockwood, 2 Harr. (Del.) 8.

<sup>28</sup> Rowland v. Meader Furniture Co. (1883), 38 Ohio St. 269

class of notes was liable for, and the court decreed an assessment, to be made on each class in a specific amount, it was held (in a suit to recover the assessment), that the policy-holder was bound by this decree.<sup>29</sup> Where a decree directing that the debts of a corporation are to be paid by the defendant stockholders in certain proportions, is reversed on appeal by some of the defendants, so as to make it necessary to find a different amount of indebtedness, the reversal vacates the decree even as to a defendant who did not appeal.<sup>30</sup> Though the capital stock and assets of an insolvent corporation are regarded as a trust fund for payment of its debts, they are not a trust fund for payment of the stockholders on dissolution.<sup>31</sup> Where contrary to assent of the minority stockholders, all the corporate property is sold and the corporation practically dissolved, they are not bound to take a *pro rata* share of the proceeds of sale in payment for their stock, or the stock of another corporation in exchange therefor, but they may elect to have the market value of their stock at the time, or their *pro rata* share of the proceeds, or they may follow their interests in the property.<sup>32</sup>

**§ 1827. Reversion and escheat of property, to grantors, and to the State.**—A common law, upon the dissolution of a corporation, its debts were extinguished, its real estate reverted to the grantor and its personality escheated to the sovereign.<sup>33</sup> While

<sup>29</sup> Lycoming Fire Ins. Co. v. Langley, 62 Md. 196.

<sup>30</sup> Alling v. Ward (Ill. 1890), 8 Ry. & Corp. L. J. 124.

<sup>31</sup> Knott v. Evening Post, 124 Fed. 342 (1903).

<sup>32</sup> Tanner v. Lindell Ry. Co., 79 S. W. 155 (Mo. 1904).

<sup>33</sup> Titcomb v. Kennebank, etc. Ins. Co., 79 Me. 315; Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412; Fox v. Horah, 1 Ired. Eq. 358, 36 Am. Dec. 48; State Bank v. State, 1 Blackf. (Ind. 267, 12 Am. Dec. 234; Coulter v. Robertson, 24 Miss. 278, 57 Am. Dec. 168; Bingham v. Weiderwax, 1 N. Y. 509; Owen v. Smith, 31 Barb. 641; Life Assn. v. Fassett, 102 Ill. 315; Malloy v. Mallett, 6 Jones' Eq. (N. C.) 345; State v. Rives, 5 Ired. 297; White v. Campbell, 5 Humph. 38; Commercial Bank v. Lockwood, 2 Harr. (Del.) 8; Miami, etc. Co. v. Gano, 13

Ohio St. 269; Lum v. Robertson, 6 Wall. 277; Curran v. State, 15 How. 304; King v. London, 8 Howell's State Trials, 1087; Attorney-General v. Lord Gowes, 9 Mod. 224; King v. Pasmore, 3 Term Rep. 199; Port Gibson v. Moore, 21 Miss. 157. Prof. Gray in his work on the "Rule Against Perpetuities" expresses doubt as to the soundness of the doctrine that the real estate of a corporation reverts to the donors or grantors or their heirs. He points out that the doctrine is based upon a statement of Lord Coke (Co. Litt. 13b), whose only justification for the statement is a mere dictum of Coke, J., in the Prior of Spaulding's case, 7 Edw. IV. 10-12, and Prof. Gray characterizes it as "the long prevalent but erroneous notion and time honored delusion that real estate remaining unsold at the dissolu-

this has long ceased to be the law with respect to private companies having capital stock,<sup>34</sup> there are a few modern decisions in which, with some modification, the old rule has been applied to railway and canal companies and to eleemosynary corporations.<sup>35</sup> Thus, in California, it was held that upon the dissolution of a theological seminary, having no debts and no stockholders, the title to its lands reverted to the original owner.<sup>36</sup> And in the case of the Mormon church, it was held that upon its dissolution, its personal property vested in the federal government, to be applied under the doctrine of *cy pres* to some kindred object, and that its realty, in excess of fifty thousand dollars in value, escheated to the United States. Mr. Justice Bradley said in this case: "When a business corporation instituted for the purposes of gain, or private interest, is dissolved, the modern doctrine is, that its property, after payment of its debts, equitably belongs to its stockholders. *But this doctrine has never been extended to public or charitable corporations.* As to these, the ancient and established rule prevails, namely: that when a corporation is dissolved, its personal property, like that of a man dying without heirs, ceases to be the subject of private ownership, and becomes subject to the disposal of the sovereign authority; whilst its real estate reverts or escheats to

tion or civil death of a corporation, reverts to the original grantor or his heirs." Gray on Rule Against Perpetuities, §§ 44 to 48; 3 Harvard Law Review, 135; Clarke and Marshall, Pri. Corp., § 328.

<sup>34</sup> Heath v. Barmore, 50 N. Y. 302; McCoy v. Farmer, 65 Mo. 244; Bacon v. Robertson, 18 How. (U. S.) 480; State v. Commercial St. Bank, 28 Neb. 677; People v. O'Brien, 45 Hun (N. Y.), 519, 7 Am. St. Rep. 684; Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627; Wilson v. Leary, 120 N. C. 90, 58 Am. St. Rep. 778, 38 L. R. A. 240; Towar v. Hale, 46 Barb. (N. Y.) 361; People v. National Trust Co., 82 N. Y. 283; Heman v. Briton, 88 Mo. 549.

<sup>35</sup> Coulter v. Robertson, 24 Miss. 278, 57 Am. Dec. 168; Bank of Mississippi v. Duncan, 56 Miss. 166; St. Philip's Church v. Zion, etc. Church, 23 S. C. 297; Hopkins

v. Whitesides, 1 Head, 31; Acklin v. Paschal, 48 Tex. 147. But see Erie, etc. R. Co. v. Casey, 26 Pa. St. 287, and State v. Rives, 5 Ired. 297. In New York land taken for the construction of canals and park purposes reverts to the state. Rexford v. Knight, 11 N. Y. 308, affirming 15 Barb. 627. Cf. Commonwealth v. Fisher, 1 Pen. & W. (Pa. Rep. 462; Plitt v. Cox, 43 Pa. St. 486; DeVaraigne v. Fox, 2 Blatchf. 95; Brooklyn Park Commissioners v. Armstrong, 45 N. Y. 234, 6 Am. Rep. 70, reversing 3 Lans. 429; Heyward v. City of New York, 7 N. Y. 314; Dingley v. City of Boston, 100 Mass. 544; Haldeman v. Pennsylvania R. Co., 50 Pa. St. 425.

<sup>36</sup> People v. Trustees of College, etc., 38 Cal. 166; Danville Seminary v. Mott, 136 Ill. 289; Titcomb v. Kennebank, etc. Co., 79 Me. 315; Mott v. Danville Seminary, 129 Ill. 403.

the grantor or donor, unless some other course of devolution has been directed by positive law, though still subject . . . to the charitable use."<sup>37</sup> Where the charter of a religious corporation being about to expire, due application for a renewal was made, but without the fault of the corporation, there was a delay in granting the renewal, it was held that when granted it related back so as to prevent a reverter of property.<sup>38</sup> A right of way as corporate property survives to the stockholders. Dissolution does not extinguish the right of stockholders of a plank-road company to continue to use the road under another charter.<sup>39</sup> Upon dissolution of a corporation its property rights survive to the stockholders; as, a lease or grant to the corporation for a period longer than its term of existence,<sup>40</sup> or a perpetual right of way.<sup>41</sup> A corporation may purchase and hold a fee, and may sell such real estate when no longer necessary, or convenient for its purposes, and may thereby defeat possibility of a reversion to the original grantor, or his heirs, upon dissolution of the corporation.<sup>42</sup> Upon the dissolu-

<sup>37</sup> Late Corporation of the Church of Jesus Christ v. United States (1890), 136 U. S. 1, holding that congress has plenary and supreme legislative power over the territories of the United States and their inhabitants; and Act Cong. Feb. 19, 1887, § 19 (Acts 1885-87, p. 638), abrogating the charter of the Church of Jesus Christ of Latter-Day Saints, granted by the legislature of Utah January 19, 1855, and dissolving the corporation, was a valid exercise of that power, and the corporation has ceased to have any existence as a civil body. Act Cong. July 1, 1862, provided that no religious or charitable corporation in the territories should hold real estate exceeding \$50,000 in value, and that all real estate held by any such corporation contrary to the act should escheat to the United States. The title of all the real estate acquired by that corporation in Salt Lake City remained in the United States as part of the public domain until November 21, 1871, when it was entered by the mayor of the city under Act Cong. March 2, 1867,

known as the "Town-Site Act." And it was held that on the dissolution of the corporation all of its real estate in such city except a block used for public purposes, reverted to the United States. The fact that all the property of the corporation was held by individuals in trust for the corporation did not prevent the title from escheating according to the intent of the acts. Mormon Church v. United States (1890), 136 U. S. 1.

<sup>38</sup> St. Phillip's Church v. Zion, etc. Church, 23 S. C. 297.

<sup>39</sup> People v. De Graw (1892), 133 N. Y. 254.

<sup>40</sup> Brown v. Schleier, 118 Fed. 981 (1902); Sioux, etc. Co. v. Trust Co. (1897), 82 Fed. 124, 173 U. S. 99 (1899); Keith v. Johnson (Ky. 1900), 59 S. W. 487; Detroit, etc. Ry. v. Detroit (1894), 64 Fed. 628; Fleitas v. City of New Orleans (1898), 51 La. Ann. 1, 24 So. 623.

<sup>41</sup> Miner v. New York, etc. R. R. (1890), 123 N. Y. 242.

<sup>42</sup> Nicoll v. New York, etc. R. R. Co. (1854), 12 N. Y. 121; Hough v. Land Co. (1874), 73 Ill. 23; Case v. Kelly (1890), 133 U. S. 21.

tion of a charitable corporation, its property goes to the State or to the donors.<sup>43</sup>

**§ 1328. Winding-up order.**—The general incorporation laws, of many States provide for continuance of the corporate existence of a dissolved corporation, for the specified period, for the purpose of winding up the corporate business.<sup>44</sup> The corporation officers sometimes becoming trustees for its creditors, and shareholders.<sup>45</sup> The term creditors, under the New York statute, is held to include all those to whom the corporation was under any enforceable obligation, as well as, to those to whom it was indebted.<sup>46</sup> Such statutory provision is held to enter into, and form part of, the charter of every corporation organized under it.<sup>47</sup> Authority, to collect debts due the corporation, is generally included in the authority to wind up its business.<sup>48</sup> The dissolved corporation may hold property till its affairs are wound up,<sup>49</sup> and may convey its property to a trustee, in trust to wind up the business.<sup>50</sup> The statute does not disturb jurisdiction in equity to administer the assets of the dissolved corporation,<sup>51</sup> or disturb its property rights. They survive for the benefit of its creditors, and shareholders.<sup>52</sup>

<sup>43</sup> *Mormon Church v. United States* (1890), 136 U. S. 11; *Danville Seminary v. Mott* (1891), 136 Ill. 289; *In re Minneapolis, etc. Assn.* (1902), 88 N. W. 977.

<sup>44</sup> *Hannan v. Sage*, 58 Fed. 651; *Tuscaloosa, etc. Assn. v. Green*, 48 Ala. 346; *Foster v. Essex Bank*, 16 Mass. 245, 8 Am. Dec. 135; *Singer v. Hutchinson*, 183 Ill. 606, 75 Am. St. Rep. 133; *Mariners' Bank v. Sewall*, 50 Me. 220; *Folger v. Chase*, 18 Pick. (35 Mass.) 63.

<sup>45</sup> *Olmstead v. Distilling, etc. Co.*, 43 Fed. 44.

<sup>46</sup> *Marsteller v. Mills*, 143 N. Y. 398.

<sup>47</sup> *Ferguson v. Miners' etc. Bank*, 3 Meigs (Tenn.) 609.

<sup>48</sup> *Mariners' Bank v. Sewall*, 50 Me. 220; *Folger v. Chase*, 18 Pick. (35 Mass.) 63.

<sup>49</sup> *State v. Fogerty*, 105 Iowa, 32.

<sup>50</sup> *Hannan v. Sage*, 58 Fed. 651.

<sup>51</sup> *School Dist. v. Greenfield*, 64 N. H. 84.

<sup>52</sup> *Bailey v. Platte, etc. Co.*, 12 Colo. 230, 21 Pac. 35.

## CHAPTER LVI.

### FOREIGN CORPORATIONS.

<p>§ 1329. "Foreign" corporation distinguished from "alien" corporation.</p> <p>1330. Rights and powers. Comity between the states. Tramp corporations.</p> <p>1331. Restrictions upon their powers.</p> <p>1332. Restrictions must not interfere with interstate commerce. Insolvency laws. Interest.</p> <p>1333. Conditions imposed by the state.</p> <p>1334. Retaliatory statutes of states.</p> <p>1334a. Taxation by the state, of foreign corporations. Interstate commerce.</p> <p>1335. Power to hold real property in the state. Cannot be executor. Cannot be trustee.</p> <p>1336. Statutory powers of the state.</p> <p>1337. Non-compliance with the statutes. Effect on contracts. <i>Quo warranto</i>.</p> <p>1338. Comity of the states.</p> <p>1339. What is "doing business" in the state. Acts that are not so held.</p> <p>1340. Citizenship, residence with reference to the powers of foreign corporations. Constitutionality of statutes excluding foreign corporations.</p> <p>1341. Legal residence with reference to the rights to sue.</p> <p>1342. Foreign corporation cannot exercise the power of eminent domain in the state.</p>	<p>§ 1343. Jurisdiction of the courts generally. Visitation.</p> <p>1344. Suits by and against foreign corporations.</p> <p>1345. Whether the suit is to be brought at law, or in equity.</p> <p>1346. Equity jurisdiction of foreign corporations.</p> <p>1347. Service of process upon foreign corporations.</p> <p>1347a. What is "doing business" in the state, so as to make service of process there effectual.</p> <p>1348. Statutes of limitation. When a foreign corporation can plead.</p> <p>1349. Garnishee process.</p> <p>1350. Suits by foreign corporations.</p> <p>1351. Suits by receivers of foreign corporations.</p> <p>1352. Actions by stockholders of foreign corporations.</p> <p>1353. Suits against foreign corporations.</p> <p>1354. Suits by non-residents against foreign corporations.</p> <p>1355. Suits by foreign corporations against foreign corporations.</p> <p>1356. Production of books and records, when required of foreign corporations.</p> <p>1357. Evidence of corporate existence of foreign companies.</p> <p>1358. Actions in federal courts.</p> <p>1359. Jurisdiction of federal courts. Rule 94 as to transferees.</p> <p>1360. Removal of causes from state courts to federal courts.</p>
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*References:*

Federal control of interstate commerce. Sections 937, 45, 45a.  
Interstate corporations. Section 45.  
Corporations created by concurrent action of two or more states. Section 45.  
Post-road act of congress, interstate commerce. Section 1088.  
Corporate power to hold realty. Sections 822a, 822b.  
Domicile of corporations. Section 106.  
Citizenship of interstate corporations. Section 107a.  
Suits by and against corporations. Sections 982-1014.  
Visitation, legislative control. Section 922.  
Foreign receivers. Sections 1239, 1240.  
Service of process on foreign corporations. Section 998.  
Production of books and records as evidence in suits. Section 1010.  
Production of books and papers of foreign corporation. Section 117.  
Migration of corporation as ground for forfeiture of charter. Sections 132, 140.  
Incorporation in one state to do business in another. Tramp corporations. Section 132, 140, 164, 598, 675, 788, 1330, 1340.

§ 1329. "Foreign" corporation distinguished from "alien."—A "foreign" corporation is one outside of the jurisdiction of the State by which it was chartered, and includes "alien" corporations, namely those incorporated in any other country. A corporation of any one of the United States or territories, is a "foreign" corporation in any other State or territory, but it is not an "alien," though the terms, "alien" and "foreign" are often used interchangeably in the statutes and decisions, as to foreign corporations. Unlike foreign corporations of other States of the Union, an alien corporation has not the common-law right to buy and sell lands in other States.<sup>1</sup> In some jurisdictions, as in Missouri, an alien corporation may purchase and hold lands the same as a corporation of any other State, its common-law disability to hold real property being removed by statute,<sup>2</sup> and in other States, where that is not the law, an alien corporation may own stock in a corporation which owns real estate.<sup>3</sup> By Act of Congress, alien corporations are prohibited from owning land in the territories.<sup>4</sup> In Great Britain, a corporation organized accord-

<sup>1</sup> *Lancaster v. Amsterdam Imp. Co.*, 140 N. Y. 576, 24 L. R. A. 322. Nat. Bank, 7 Mont. 530. *Vide infra*, § 1335.

<sup>2</sup> *Missouri, etc. Co. v. Reinhard*, 114 Mo. 218, 35 Am. St. Rep. 746. <sup>4</sup> *Potter v. Rio Arriba, etc. Co.*, 4 N. M. 322, 17 Pac. 609, 19 Pac. 210.

<sup>3</sup> *Princeton, etc. Co. v. First*

ing to the laws of any other country, is an alien, although many or all of its stockholders or members are British subjects.<sup>5</sup> A corporation may at the same time be both foreign and domestic, as to the government of one particular State, where a foreign corporation by incorporation with a domestic corporation absorbs its property and franchises, under authority of the laws of the domestic State.<sup>6</sup>

**§ 1330. Rights and powers. Comity between the States.**  
**"Tramp corporations."**—The policy of the State is to accord to foreign corporations, by comity, full privilege to exercise their corporate franchises in the State, except so far as is expressly limited by law.<sup>7</sup> By compliance with State laws, they acquire the same, but no greater, rights or privileges, and the same protection of the laws, as in case of domestic corporations.<sup>8</sup> A corporation of any one State may do business in any other State unless it is therein forbidden.<sup>9</sup> A foreign corporation may be excluded from doing business in the State, excepting the business of interstate commerce.<sup>10</sup> Unlawfully combining in restraint of trade, or to lessen competition, is good ground for prohibiting foreign corporation from doing business in the State.<sup>11</sup> It may transact only such business in the State as is permitted to a domestic corporation to do.<sup>12</sup> It may be required to pay a license-fee as a condition to its doing business in the State.<sup>13</sup> It may not do business in the State without compliance with its statutory regulations.<sup>14</sup> *Quo warranto* lies to oust a foreign corporation from doing business in the State, contrary to its laws, or without compliance with its reasonable conditions for doing business.<sup>15</sup> It is free to engage

<sup>5</sup> *Jansen v. Dreifontein, etc. Mines* (1902), 71 Law J. K. B. 857.

<sup>6</sup> *McGregor v. Erie Ry. Co.*, 35 N. J. L. 115. *Vide infra*, § 1340, FOREIGN CORPORATIONS DISTINGUISHED FROM DOMESTIC.

<sup>7</sup> *Chicago Title & T. Co. v. Bashford* (Wis. 1904), 97 N. W. 940.

<sup>8</sup> *Hiskey v. Pacific, etc. Co.* (1904), 20 Utah, 1.

<sup>9</sup> *People v. Fidelity, etc. Co.* (1894), 153 Ill. 25; *Tootle v. Singer* (Iowa, 1901), 88 N. W. 446.

<sup>10</sup> *Huffman v. Western, etc. Co.* (1896), 13 Tex. Civ. App. 169, 36 S. W. 306.

<sup>11</sup> *State v. Schlitz, etc. Co.*

(Tenn. 1900), 59 S. W. 1033, 78 Am. St. Rep. 941; *Waters-Pierce, etc. Co. v. Texas* (1900), 177 U. S. 28.

<sup>12</sup> *Floyd v. National, etc. Co.* (1901), 49 W. Va. 327, 38 S. E. 653, 45 L. R. A. 536, 87 Am. St. Rep. 805; *Williams v. Gold Hill, etc. Co.* (1899), 96 Fed. 454, 186 U. S. 157 (1902); *State v. Cook* (Mo. 1903), 71 S. W. 829.

<sup>13</sup> *Pembina, etc. Co. v. Pennsylvania* (1888), 125 U. S. 181.

<sup>14</sup> *Reliance Mut. Ins. Co. v. Sawyer* (1894), 160 Mass. 413, 36 N. E. 59.

<sup>15</sup> *State v. American, etc. Co.* (Kan. 1902), 69 Pac. 563; *State v.*

in interstate commerce without interference by State restrictions.<sup>16</sup> Traveling salesmen of foreign corporations can not be prohibited or taxed, as a condition of entering the State and making contracts for the sale of goods.<sup>17</sup> Corporations of one State have no absolute right to transact business in other States. They depend for such right and power upon the comity of States. That comity may be extended, and assent granted, upon such terms and conditions as any State may see proper to impose. If no constitutional provision is violated it may altogether exclude a foreign corporation from the privilege of transacting business. It may restrict the business to particular localities, or it may exact security, by requiring deposits, or otherwise, for the performance of contracts with its citizens, and impose such taxation, as is warranted by its own constitution.<sup>18</sup> It is well settled that corporations of one State may exercise their faculties in another only so far, and on such terms and to such extent, as may be permitted by the latter. The question is always one of legislative intent, and not of legislative power or legal possibility.<sup>19</sup> Accordingly a corporation created by one State can transact business in another only with the consent, express or implied, of the latter. The existence of a corporation in a foreign jurisdiction is recognized, not by right, but of grace.<sup>20</sup> In other words, the right of a corporation formed in one State to exercise its corporate powers in another State is dependent upon the will of the latter.<sup>21</sup> The

Standard Oil Co. (1900), 61 Neb. 28, 87 Am. St. Rep. 449; Secretary of State v. National, etc Co. (Mich. 1901), 86 N. W. 124.

<sup>16</sup> Telegraph Co. v. Texas (1881), 106 U. S. 460; Zion, etc. Assn. v. Mayo (1899), 22 Mont. 100, 55 Pac. 915; Texas, etc. Ry. v. Davis (1900), 93 Tex. 378, 54 S. W. 381, 55 S. W. 562; Milan, etc. Co. v. Gorten (1894), 93 Tenn. 590, 27 S. W. 971, 26 L. R. A. 135.

<sup>17</sup> Davis, etc. Co. v. Dix (1894), 64 Fed. 406; Aultman, etc. Co. v. Holder (1895), 68 Fed. 467; Coit v. Sutton (1894), 102 Mich. 324, 60 N. W. 690.

<sup>18</sup> Paul v. Virginia, 8 Wall. 168.

<sup>19</sup> Railroad Co. v. Harris, 12 Wall. 65, 82; Doyle v. Continental Ins. Co., 94 U. S. 535; Morawetz on Corporations, § 513.

<sup>20</sup> Farmers', etc. Co. v. Harrah, 47 Ind. 236; Home Ins. Co. v. Davis, 29 Mich. 238; Erie Ry. Co. v. State, 31 N. J. L. 531, 86 Am. Dec. 226; People v. Fire Assn., 92 N. Y. 311; Western, etc. Co. v. Mayer, 28 Ohio St. 521; Bank of Augusta v. Earle, 13 Pet. 519; Lafayette Ins. Co. v. French, 18 How. 404; Paul v. Virginia, 8 Wall. 168; Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566.

<sup>21</sup> Commonwealth v. Milton (1851), 12 B. Mon. 212, 54 Am. Dec. 522; Erie Ry. v. State (1864), 31 N. J. 531, 86 Am. Dec. 226; Ducat v. City of Chicago (1868), 48 Ill. 172, 95 Am. Dec. 529; Phoenix Ins. Co. v. Commonwealth (1868), 5 Bush, 68, 96 Am. Dec. 331. *Vide infra*, § 1338, COMITY.

comity between the States in allowing foreign corporations to make and enforce contracts therein, is an act of sovereignty, and will not be extended by a State when contrary to its policy or prejudicial to its interests.<sup>22</sup> In accordance with these principles, a State has power to exclude from its territory corporations chartered by other States, and the motive of such expulsion can not be inquired into.<sup>23</sup> A foreign corporation can not be permitted to do business that is not allowed by the State laws.<sup>24</sup> A distinction may be made between companies of different States of the union, and those of foreign countries. Therefore, under a statute requiring insurance companies, as a condition of doing business in the State, to make a certain deposit with the Michigan State treasurer, or with certain named officers of the State where the company is "organized," a British or other foreign company can not be considered as organized in another State in which it is merely licensed to do business, so as to meet the requirements of

<sup>22</sup> *Ducat v. City of Chicago* (1868), 48 Ill. 172, 95 Am. Dec. 529.

<sup>23</sup> *Morawetz on Corporations*, § 971 (2d ed.); *People v. Fire Assn.*, 92 N. Y. 311; *Western, etc. Co. v. Mayer*, 28 Ohio St. 521; *Doyle v. Continental Ins. Co.*, 94 U. S. 535.

<sup>24</sup> The laws of Illinois provide for the organization of only two kinds of fire insurance companies—joint-stock companies and companies organized on the mutual plan. A fire insurance company, incorporated under the laws of another state, must show itself one of these two kinds before it is entitled to a license to do business in Illinois. *Mutual Fire Ins. Co. v. Surgett* (1887), 120 Ill. 36. This case more at large was as follows: The Mutual Fire Insurance Company was organized under the laws of New York as a joint-stock company, with sufficient capital to entitle it to do business in this state, but its charter was afterwards amended by law, since which it has been regarded in New York as a mutual company. The amendment provides that the company is authorized to receive

from any number of persons subscriptions payable in cash, and give therefor receipts bearing interest, which receipts shall set forth that they are given for money received in advance for premiums, that the amounts thereof are liable for the expenses and losses of the company, that the receipts shall be received by the company only in payment for premiums of insurance, and that the company may commence business on the mutual plan when the whole amount subscribed and paid in cash shall reach \$200,000. The amendment does not, however, provide that the persons thus subscribing or lending money to the company, ostensibly for insurance, should take policies of insurance the premiums on which should equal the amount lent or subscribed to the company. And it is held that the company cannot, on this plan, be said to be a corporation for insurance, organized on the mutual plan, as contemplated by the laws of Illinois, and therefore is not entitled to a foreign insurance company's license to do business in that state.

the statute, by a deposit made in such other State.<sup>25</sup> As the State has no extra-territorial power, it can not confer upon its creature, the corporation, any right or power to be exercised beyond the State's own jurisdiction. It must dwell in the place of its creation, and can not migrate to another sovereignty,<sup>26</sup> but a corporation, the same as a natural person, being resident in one State, may, to the extent of its home power, do business and make contracts by agent in any other State, by its own consent, and to the extent not prohibited.<sup>27</sup>

"*Tramp corporations.*"—The vast majority of all the corporate business done in the United States, is done by foreign corporations, and as interstate commerce. Substantially all the corporations of today are the creatures of the different States. The corporate business of the country is carried on under the "State System." The ordinary large corporation does only a small proportion of its entire business in the State which chartered it. All the rest of its business is done as a foreign corporation. Under the principle of comity, the organizer of a corporation has the choice of all the corporation laws of the various States. If the corporation laws of its own State are not sufficiently lax and liberal, it may incorporate in a more complacent State, and easily come back to the first State to do business. A corporation which is created under the laws of one State, with no intent to do business there, but to return as a foreign corporation to its own State as its place of business, is called a tramp corporation, and may be a fraud. Some States, by lax incorporation laws, and for the purpose of revenue, seek to attract incorporation to themselves. The result is tendency of such State legislation toward the lowest level of lax regulation and of extreme favor toward this special class of financial or speculative incorporators, regardless of the interests of the other classes properly concerned. The effect of this bidding of State against State for corporation revenue, from "broad" corporation laws,—is that companies whose operations cover many States, are often subjected to the loose conditions imposed by one, such bidding State. Such incorporation is declared to be a fraud.<sup>28</sup> In the enactment of enabling acts for

<sup>25</sup> Employers', etc. Co. v. Commissioner (1887), 64 Mich. 614; Mich. Laws 1881, p. 279.

<sup>26</sup> Bank of Augusta v. Earle, 13 Pet. (U. S.) 519; Duke v. Taylor, 37 Fla. 64, 53 Am. St. Rep. 232, 19 South. 172, 31 L. R. A. 484.

<sup>27</sup> Cowell v. Colorado Springs Co., 100 U. S. 55; Ohio, etc. Co. v. Merchants', etc. Co., 11 Humph. (Tenn.) 1, 53 Am. Dec. 742.

<sup>28</sup> Vide *infra*, TRAMP CORPORATIONS, §§ 132, 675, 787, 164, 598, 788, 1294.

incorporation, the wisdom and patriotism of a single State, or of many States, is unavailing against the lack of either, in any one State whose "commercialism" invites the tramp incorporation. Under the "State System," of corporation law, its diversity is such that in operation it amounts to anarchy. It is obviously impossible that 45 different jurisdictions should agree on anything like a uniform system, in so important a matter as corporation law. The remedy is to be expected only in federal license, or franchise, for all corporations engaged in interstate commerce.<sup>29</sup> Mr. Justice Harlan of the United States Supreme Court, in deciding the Northern Securities case, said: "No State, by merely creating a corporation, or by any other mode, can project its authority into other States, and across the Continent."<sup>30</sup> Under such "broad" corporation laws, speculative corporations with enormous capitalization and no capital, can be organized readily, and are subject to no supervision. These loose corporation laws permit over-capitalization, and make it easy to defraud the investor. In these defective incorporation laws, the United States is as great an offender as any of the States. Instead of being so wisely framed that they may serve as a model for the States, the incorporation laws of the District of Columbia are fatally defective. So reports the president to Congress. Congress legislates for the District, and is responsible for defects in these laws. Under them a brisk trade is carried on in District of Columbia charters. They are largely advertised for sale, in competition with those of New Jersey, West Virginia and other States. In the years 1903 and 1904, over two thousand companies, with aggregate authorized capital of over four billions of dollars, have been incorporated under these District of Columbia charters. Possibly, in considering the question of federal regulation and supervision of corporations organized under State charters, Congress may begin at home, and reform these speculative incorporation laws of the District of Columbia. As the foreign corporation laws of the States generally stand, any corporation organized under the laws of any other State, can do business, by simply filing a transcript of its incorporation papers with the Secretary of State, and taking out a license. To New Jersey and the District of Columbia may be added, Delaware, Maine, Nevada, Wyoming, Idaho, North and South Dakota, Oklahoma and Arizona, bidding for the priv-

<sup>29</sup> *Vide*, Annual Message of the President of the United States to Congress, Dec., 1904.

<sup>30</sup> *Northern Securities v. United States* (1904), 193 U. S. 197.

ilege of chartering corporations by vying with one another in trying which can offer the "broadest" inducements. The Nevada law undertakes to relieve the stockholder from any liability, makes two as a sufficient number of incorporators, and they may be husband and wife. Though any one State, for protection of investors, may require that its domestic corporations shall have their capital stock fully paid up, this would not affect foreign companies doing business in the State, under charter not requiring payment of any of the capital stock. Thus many foreign corporations under operation of the comity of the States, enjoy privileges and advantages superior to those of domestic corporations,—and have them at a disadvantage.

**§ 1331. Restrictions upon their powers.**—Any restrictions it may deem proper, not repugnant to the law of the land, a State may impose upon a foreign corporation, as a condition to its doing business in the State.<sup>31</sup> Except as to corporations engaged in interstate commerce, a State may, in its discretion, require a foreign corporation to comply with certain prescribed formalities, to pay taxes, licenses, and to assume obligations that may be required of it, as a condition precedent to the right to transact business within its jurisdiction.<sup>32</sup> Furthermore, it is clear that a State has power to discriminate against a foreign corporation desiring to transact business within its territory, and it has been expressly decided both by the State and federal courts that a State has the right to impose upon a corporation chartered by another State, a tax or burden for the privilege of transacting its business, such as is transacted wholly within the State, although no such burdens are imposed upon like corporations chartered by its own legislature.<sup>33</sup> A State may impose upon such business of

<sup>31</sup> *State v. Insurance Co. etc.* (Neb. 1904), 99 N. W. 36. *Vide,* 24 L. R. A. 289, RESTRICTIONS UPON POWERS OF FOREIGN CORPORATIONS.

<sup>32</sup> *Netley v. Clark Gardner, etc. Co.*, 4 Col. 369; *Goldsmith v. Home Ins. Co.*, 62 Ga. 379; *People v. Thurber*, 13 Ill. 354; *Fireman's B. Assn. v. Lounsbury*, 21 Ill. 511, 74 Am. Dec. 775; *Cincinnati, etc. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626; *Western, etc. Co. v. Lieb*, 76 Ill. 174; *Farmers', etc. Co. v. Harrrah*, 47 Ind. 236; *Phoenix Ins. Co. v. Commonwealth*, 5 Bush, 68;

*State v. Fosdick*, 21 La. Ann. 434; *Att'y-Gen. v. Bay State, etc. Co.*, 99 Mass. 148; *Home Ins. Co. v. Davis*, 29 Mich. 238; *People v. Imlay*, 20 Barb. 68; *People v. Fire Assn.*, 92 N. Y. 311; *Western, etc. Co. v. Mayer*, 28 Ohio St. 521; *Fire Dep't v. Helfenstein*, 16 Wis. 136; *St. Clair v. Cox*, 106 U. S. 350.

<sup>33</sup> *Angell & Ames on Corporations*, § 486; *St. Clair v. Cox*, 106 U. S. 350; *Commonwealth v. Milton*, 12 B. Mon. 212, 54 Am. Dec. 522; *Phoenix Ins. Co. v. Commonwealth*, 5 Bush, 68; *State v. Fos-*

foreign corporations the same burdens in the way of license fees, taxes and the like, that its corporations have to bear as a condition of their doing business in other jurisdictions.<sup>34</sup> Accordingly a statute has been sustained which provided that a foreign corporation should pay to the State superintendent of the insurance department, in taxes and fines, an amount equal to that imposed by existing or future laws of the State of its origin, upon companies of the former State, seeking to do business in the latter, when such amount would be greater than that required for such purposes by the then existing laws of the former.<sup>35</sup> Discrimination in taxation may be made between foreign corporations and domestic corporations of the same character.<sup>36</sup> For it is said that a tax, imposed upon a corporation, is not a tax upon the persons or property of corporators or stockholders. It is the artificial being, the mere legal entity which is taxed, and the tax is paid out of its funds. And as a foreign corporation has no *status* as a citizen of the State admitting it, the objection that a tax imposed upon it is not uniform, can not be maintained.<sup>37</sup> But a State can not tax a foreign corporation upon a different principle, or in a different manner, from that applied to her own corporations.<sup>38</sup> The privilege, by comity accorded to the corporation of one State to act and contract in another, may constitutionally be refused by any State,<sup>39</sup> except as to the business of corporations engaged in interstate commerce.<sup>40</sup> A requirement, that foreign and State corporations shall pay their employes once a month, and give them a prior lien, is unconstitutional as violative of the law of contracts,—is a denial of equal protection of the laws, and

dick, 21 La. Ann. 434; *Tatem v. Wright*, 23 N. J. 429; *Fire Dep't v. Noble*, 3 E. D. Smith, 440; *Fire Dep't v. Wright*, 3 E. D. Smith, 453; *Fire Dep't v. Helfenstein*, 16 Wis. 136.

<sup>34</sup> *Goldsmith v. Home Ins. Co.*, 62 Ga. 379.

<sup>35</sup> *People v. Fire Assn.*, 92 N. Y. 311.

<sup>36</sup> *Ducat v. City of Chicago* (1868), 48 Ill. 172, 95 Am. Dec. 529.

<sup>37</sup> *Ducat v. City of Chicago* (1868), 48 Ill. 172, 95 Am. Dec. 529.

<sup>38</sup> *Erie Ry. Co. v. State*, 31 N. J. 531.

<sup>39</sup> *Pierce v. People*, 106 Ill. 11, 43 Am. Rep. 683; *State v. Phipps*, 50 Kan. 609, 34 Am. St. Rep. 152; *Bank of Augusta v. Earle*, 13 Peters, 519; *Doyle v. Continental Ins. Co.*, 94 U. S. 535; *Williams v. Gold Hill*, etc. Co., 96 Fed. 454, 186 U. S. 157.

<sup>40</sup> *Gunn v. White*, etc. Co., 57 Ark. 24, 20 S. W. 591, 18 L. R. A. 206, 38 Am. St. Rep. 233; *Zion, etc. Assn. v. Mayo*, 22 Mont. 100, 55 Pac. 915; *Texas, etc. Ry. v. Davis*, 93 Tex. 378, 55 S. W. 562; *Huffman v. Western, etc. Co.*, 13 Tex. Civ. App. 169, 13 S. W. 306..

is deprivation of property without due process of law.<sup>41</sup> And so, is unconstitutional, a statute voiding contracts of traveling salesmen of foreign corporations unless a fee is paid to the State.<sup>42</sup> After it has been allowed to extend its line of railroad within the State, the corporation can not be compelled to become a domestic corporation.<sup>43</sup> As to the contracts of foreign corporations which have not complied with the State laws in reference to filing certificates, appointing a local agent, and keeping an office in the State, etc., there is much variance in interpretation by the courts. Some courts have declared those contracts void and unenforceable,<sup>44</sup> but it is now generally held that they are not void, although not enforceable until compliance with the requirement.<sup>45</sup> Where a contract, made by a foreign corporation, provides that it shall not take effect until approved at the home office in another State, it is held that the contract is not made within the foreign State.<sup>46</sup> A premium note, given to a foreign insurance company which had not complied with such requirement, is not collectable in the company's hands, but is valid in the hands of a *bona fide* holder for value without notice.<sup>47</sup> Restrictions, upon foreign insurance companies, are strictly enforced in all the States.<sup>48</sup> Statutory preference given to its own citizens, as to assets within the State, of an insolvent foreign corporation, is held unconstitutional as to non-resident creditors, but constitutional as to foreign corporations who are creditors.<sup>49</sup> A statute, requiring foreign corporations to agree to remove suits to the federal courts, is void.<sup>50</sup> A statute, that no suit shall be instituted by a foreign corporation, which has not filed a report as to its business, does not bar the United States from exercising jurisdiction.<sup>51</sup>

<sup>41</sup> Johnson v. Goodyear, etc. Co. (Cal. 1899), 59 Pac. 304, 47 L. R. A. 338, 37 Am. St. Rep. 17.

<sup>42</sup> Aultman, etc. Co. v. Holder, 68 Fed. 467; Davis, etc. Co. v. Dix, 64 Fed. 406.

<sup>43</sup> Commonwealth v. Mobile, etc. R. Co. (Ky. 1901), 64 S. W. 451, 54 L. R. A. 910.

<sup>44</sup> *In re Comstock*, 3 Sawy. 218; *Columbia v. Paige*, 6 Oreg. 431.

<sup>45</sup> Wood, etc. Co. v. Colwell, 54 Ind. 270; Cincinnati, etc. Co. v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 626; *Elston v. Pigott*, 94 Ind. 14; *Kilgore v. Smith*, 122 Pa. St. 48, 15 Atl. 698.

<sup>46</sup> Holder v. Aultman, 169 U. S. 81; *Rough v. Breitung*, 117 Mich. 48.

<sup>47</sup> Jones v. Smith, 69 Mass. 500.

<sup>48</sup> Reliance Mutual Ins. Co. v. Sawyer, 160 Mass. 413, 36 N. E. 59.

<sup>49</sup> McClung v. Embreeville, etc. Ry. (1899), 103 Tenn. 399, 52 S. W. 1001; *Blake v. McClung* (1898), 182 U. S. 239.

<sup>50</sup> *Rece v. Newport News, etc. Co.*, 32 W. Va. 164, 9 S. E. 212, 3 L. R. A. 572.

<sup>51</sup> Commonwealth v. East Tennessee Coal Co., 97 Ky. 238, 30 S. W. 608; *Barling v. Bank of British, etc.*, 50 Fed. 260.

**§ 1332. Restrictions must not interfere with interstate commerce. Insolvency laws. Interest.**—The exclusive authority to regulate commerce between the States, is a part of constitutional power of Congress;—with which no law of any State is allowed to interfere. It follows that a foreign corporation has the right to conduct its interstate business in any State free from tax or other condition imposed by State law;<sup>52</sup> for example: Its right to ship into or through the State, goods sold by it in other States, upon orders of its traveling salesmen,<sup>53</sup> and to bring suits in the State courts to recover the price of such goods; the right of a foreign telegraph company to transmit messages to or through the State;<sup>54</sup> the right of railroad express company, or other common carrier, to transport passengers or goods to or through the State.<sup>55</sup> But when a foreign corporation engages in business wholly within the State, it is subject, the same as any domestic corporation, to whatever conditions or burdens the State may impose.<sup>56</sup> A foreign corporation, engaged in interstate commerce, may sue in the courts of the State, without complying with the State laws entitling it to do business there,<sup>57</sup> and may sue on any contract involving interstate commerce.<sup>58</sup> A foreign corporation not having an office in the State, may sell machinery to persons in the State, without filing its papers, etc.<sup>59</sup> or may sell a sewing-machine made in Ohio and shipped to Arkansas.<sup>60</sup> A foreign milling company may, through commercial agents, sell goods in the State of Texas.<sup>61</sup>

*As to insolvency laws,* the weight of authority is that they have no extra-territorial operation, and that an insolvent foreign corporation may make valid assignment or preference of creditors in

<sup>52</sup> Cooper Manuf. Co. v. Ferguson, 113 U. S. 727; Pickard v. Pullman, etc. Co., 117 U. S. 34; Crutcher v. Kentucky, 141 U. S. 47. *Vide* 24 L. R. A. 311, RESTRICTIONS BY THE STATE UPON INTERSTATE COMMERCE, and *vide supra*, §§ 45, 45a, and 937.

<sup>53</sup> Commonwealth v. Smith, 92 Ky. 38, 36 Am. St. Rep. 578; Stotenburgh v. Henick, 129 U. S. 141; McNaughton v. McGirl, 20 Mont. 124, 63 Am. St. Rep. 610.

<sup>54</sup> LeLoup v. Port of Mobile, 127 U. S. 640; Commonwealth v. Smith, 92 Ky. 38, 36 Am. St. Rep. 578.

<sup>55</sup> Crutcher v. Kentucky, 141 U. S. 47.

<sup>56</sup> Osborne v. Florida, 164 U. S. 650, 14 South. 588, 25 L. R. A. 120; Cable Co. v. Adams, 71 Miss. 555, 42 Am. St. Rep. 476.

<sup>57</sup> Zion, etc. Assn. v. Mayo, 22 Mont. 100, 55 Pac. 915.

<sup>58</sup> Texas, etc. Ry. Co. v. Davis, 93 Tex. 378, 55 S. W. 562.

<sup>59</sup> Milan, etc. Co. v. Gorten, 93 Tenn. 590, 27 S. W. 971, 26 L. R. A. 135.

<sup>60</sup> Gunn v. White, etc. Co., 57 Ark. 24, 20 S. W. 591, 12 L. R. A. 206, 38 Am. St. Rep. 223.

<sup>61</sup> Bateman v. Western, etc. Co., 1 Tex. Civ. App. 90, 20 S. W. 931.

another State where it is doing business, though it would not be valid in its home State.<sup>62</sup>

*Interest.*—Where a corporation, authorized to loan money, is, by its charter, or by statute prohibited from making any loan or contract, usurious under the existing laws of the State, or in excess of a specified rate of interest, this is intended to apply only in the State of its creation, and not to prohibit taking in another State—any rate of interest allowed by their laws.<sup>63</sup>

**§ 1333. Conditions imposed by the State.**—“Depending purely upon the comity and assent of other States for recognition of its existence, and enforcement of its contracts therein, it follows that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts, with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.”<sup>64</sup> In accordance with this doctrine, a State, among other conditions, may impose as a condition of a foreign corporation’s doing business therein, that process on the corporation’s agent shall be considered as service upon the corporation itself; and such a condition is neither unconstitutional nor unreasonable.<sup>65</sup> “If a State permits a foreign corporation to do business within her limits, and at the same time provides that, in suits against it for business done there, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the State are to be deemed to assent to such condition, as fully as though they had specially authorized their agents to receive service of the process. Such conditions must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party, before he can be bound by it. It must be reasonable; and the service provided for should only be upon such agents as may be properly deemed representatives of the foreign cor-

<sup>62</sup> *Borton v. Brines Chase Co.*, 175 Pa. St. 209; *East Side Bank v. Columbus Tanning Co.*, 170 Pa. St. 1, 32 Atl. 539; *Pairpoint Manuf. Co. v. Philadelphia, etc. Co.*, 161 Pa. St. 17.

<sup>63</sup> *Hitchcock, etc. v. U. S. Bank*, 7 Ala. 386; *Baird v. Poole*, 12 N.

Y. 495; *Bank of Louisville v. Young*, 37 Mo. 398.

<sup>64</sup> *State v. Fleming* (Neb. 1903), 97 N. W. 1063; *Paul v. Virginia* 8 Wall. (U. S.), 168.

<sup>65</sup> *Lafayette Ins. Co. v. French*, 18 How. 404.

poration."<sup>66</sup> It has been said that a statute requiring foreign corporations to comply with certain conditions, such as appointing an attorney, on whom process could be served, before transacting business in the State, does not apply to corporations engaged in the manufacture and sale of articles covered by letters patent.<sup>67</sup> But the contrary is the better rule.<sup>68</sup> Some State courts have decided that a condition, that foreign corporations shall submit themselves to the jurisdiction of the State courts, and not transfer causes to the federal courts, is valid.<sup>69</sup> But by the highest federal court it has been held that a statute which enacted that a foreign corporation should not transact business in the State in which it was enacted, unless it stipulated in advance that it would not remove into the federal courts any suit which might be commenced against it in the State, was repugnant to the constitution of the United States, and void; and that an agreement, entered into pursuant to such statute, was of no effect,<sup>70</sup>—especially when it is apparent that the entire purpose of the statutes is to deprive such companies of that right.<sup>71</sup> A foreign corporation having a resident agent in the State, soliciting orders for goods, to whom they are sent for delivery, does not relieve the corporation from requirement in regard to foreign corporations doing business in the State.<sup>72</sup>

<sup>66</sup> Justice Field in *St. Clair v. Cox*, 106 U. S. 356.

<sup>67</sup> *Grover, etc. Co. v. Butler*; 53 Ind. 454, 21 Am. Rep. 200.

<sup>68</sup> *Patterson v. Commonwealth*, 11 Bush, 311, 21 Am. Rep. 220, not following the Indiana case, which is condemned also in the note 22 Am. Rep., p. 67, as going too far, according to the cases, inasmuch as the law was a general law uniform in its operations and did not in any degree interfere with the sale or assignments of rights under letters patent.

<sup>69</sup> *Home Ins. Co. v. Davis*, 29 Mich. 238, and holding that these acts are not contrary to the section of the constitution giving the United States power to regulate commerce between the states; nor to the fourteenth amendment of the United States constitution, prohibiting states from passing

laws abridging the privileges of citizens of the United States, or denying to any person within the jurisdiction of the state the equal protection of its laws; and that such a statute is not unconstitutional, as interfering with the judicial power of the United States as established by the constitution and laws of the United States. *Goodrel v. Kreichbaum* (1886), 70 Iowa, 362.

<sup>70</sup> *Insurance Co. v. Morse*, 20 Wall. 445; *Doyle v. Continental Ins. Co.*, 94 U. S. 535; *Rece v. Newport News, etc. Co.*, 32 W. Va. 165, 3 L. R. A. 572; *Commonwealth v. East Tennessee Coal Co.*, 97 Ky. 238, 30 S. W. 608.

<sup>71</sup> *Barron v. Burnside* (1887), 121 U. S. 186.

<sup>72</sup> *John Deere Plow Co. v. Wyland* (Kan. 1904), 76 Pac. 863.

**§ 1334. Retaliatory statutes of States.**—Retaliatory statutes, placing foreign corporations under like burdens and restrictions, as are imposed by their home States, have been enacted in several States; as, in Ohio, a statute provides: “when by the laws of any other State or nation, any taxes, fines, penalties, license fees, deposits of money, or securities or other obligations, or prohibitions are imposed on insurance companies of this State, doing business in such State or nation, or upon their agents therein, so long as such laws continue in force, the same obligations and prohibitions, of whatever kind, shall be imposed upon all insurance companies of such other State or nation doing business within this State and upon their agents here.”<sup>73</sup> In California and Minnesota similar constitutional provisions exist,<sup>74</sup> and by statute in other jurisdictions.<sup>75</sup> These statutes are strictly construed as penal in their character.<sup>76</sup>

**§ 1334a. Taxation by the State, of foreign corporations. Interstate commerce.**—“The State tax laws are at present in a state of great confusion, based upon wrong, or conflicting principles, resulting frequently either in double taxation, or in total escape from taxation, and being often obscure and complex as to defy interpretation, even by the State officials charged with their execution.”<sup>77</sup>

*Taxation of gross receipts of a corporation, engaged in interstate commerce.*—It was supposed to be settled that gross receipts derived by a corporation from interstate commerce, could not be taxed by a State;—until the case of *Maine v. Grand Trunk R'y.*<sup>78</sup> In that case the court, by a majority of one, held that the franchise or right to do interstate business, in the State of Maine, could be taxed by laying a tax upon a fraction of the entire gross receipts, determined by the rates of the entire mileage of said road to the mileage in the State of Maine. The reasoning was, that the tax was one upon a franchise granted by the State, and was a condi-

<sup>73</sup> *State v. Reinmund*, 45 Ohio St. 214; *State v. Fidelity, etc. Co.*, 49 Ohio St. 440, 34 Am. St. Rep. 573.

<sup>74</sup> *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076; *State v. Fidelity, etc. Co.*, 39 Minn. 538, 41 N. W. 108.

<sup>75</sup> *People v. Fidelity, etc. Co.*, 153 Ill. 25, 38 N. E. 752, 26 L. R. A. 295; *People v. Fire Assn. etc.*,

92 N. Y. 311, 44 Am. Rep. 380; *Blackmer v. Royal Ins. Co.*, 115 Ind. 291.

<sup>76</sup> *State v. Fidelity, etc. Co.*, 49 Ohio St. 440, 34 Am. St. Rep. 573.

<sup>77</sup> Report of Commissioner of Corporations to Department of Commerce and Labor, Dec. 19, 1904.

<sup>78</sup> *Maine v. Grand Trunk Ry.* (1891), 142 U. S. 217.

*ion of the grant of such franchise, or of its continuance; and that the basing of such tax upon a proportion of the gross receipts, was merely a formal method of determining the value of such franchise.* A vigorous dissenting opinion by four judges was filed. If this case is conclusive of the question, the old rule against the taxation of interstate commerce can readily be evaded (at least as regards domestic franchise), by *a mere form of words* in the statute.

*Corporate franchises necessary instrumentalities of interstate commerce. Its insecure position based on State franchises.*—So far as now developed, it seems to be held that a State can tax, as property, the corporate franchises to be or to do, issued by another State and used in the taxing State, in interstate commerce. It cannot, however, lay a tax upon the privilege of engaging in interstate commerce; or more correctly, it can tax the franchise or power, as property, but can not insist upon any conditions precedent to its use. The power can be used in spite of State objection, but being used it can be taxed as property.<sup>79</sup> This distinction seems more valuable abstractly than practically. If the State can tax, as property, such a foreign franchise, which franchise is essential for the carrying on of interstate commerce, it can lay upon it such taxation by overvaluation as will practically destroy the value of the power, and, presumably, its use of corporate franchises being peculiarly intangible, they can practically be assessed or valued at any figure the assessor chooses to put on them. Briefly stated, the result under the present state of the law seems to be: (1) State corporate franchises to be and to do are essential for carrying on interstate commerce in the corporate form (which is practically the prevailing form); (2) a State can so tax such franchises as to practically destroy them. Of course, no State can, as against the United States, give the actual franchise or power to engage in interstate commerce. Such grant lies only within the power of the United States. But in the vast majority of corporations, and excepting the few trans-continental railroads, the United States has not exercised its power, and the power to carry on interstate commerce is practically exercised only by means of State corporate franchises, used in foreign States under State comity. If, accordingly, the legal principles above set

<sup>79</sup> Western Union T. Co. v. U. S. 227; Postal Tel. Co. v. Adam, Massachusetts, 125 U. S. 530; 155 U. S. 668; Adams Exp. Co. v. Maine v. Grand Trunk Ry., 142 Ohio, 165 U. S. 194, 166 U. S. 185.

forth are correct, such franchises are, therefore, the essential elements of carrying on a corporate interstate business, and are at the mercy of State taxation under the present "State incorporation system." A State corporation franchise used for the purpose of interstate commerce, is subject to taxation and other regulation by the States, only in the silence of Congress. It may legislate, totally forbidding, or partially restricting, the right of the States to tax such franchises, when used in interstate commerce.<sup>80</sup>

*Corporate interstate commerce, in order to be permanently and securely established, must be based on federal franchises to engage in interstate commerce.*—Briefly, the United States should issue to corporations, proposing to engage in interstate commerce, a franchise to so engage. This would be beyond the power of the States to tax or otherwise burden.<sup>81</sup>

**§ 1335. Power to hold real property in the State. Can not be executor. Can not be trustee.**—The right of a foreign corporation to acquire, hold and transfer, real estate, is the same as that of any natural person, or of a domestic corporation, and to the same extent which the foreign corporation is empowered to hold and transfer the same in its home State, but subject to the governing laws in other States.<sup>82</sup> Subject to those conditions, it may acquire and hold lands in other States to the extent necessary for its corporate purposes.<sup>83</sup> But the power depends altogether upon the comity of the other State, notwithstanding the powers the corporation has under its charter.<sup>84</sup> It may not so hold land in the foreign State, contrary to its public policy.<sup>85</sup> Where a foreign corporation is prohibited from acquiring and holding real property, it can not acquire it evasively through a domestic corporation, for the purpose of concealing the real ownership.<sup>86</sup> Transfer of real property to a foreign corporation, contrary to its prohibition, is void and vests no title.<sup>87</sup> A corporation

<sup>80</sup> Cooley v. The Board of Port Wardens, 12 How. (U. S.) 299.

<sup>81</sup> Report of Commissioner of Corporations to Department of Commerce, Dec. 19, 1904.

<sup>82</sup> American, etc. Union v. Yount, 101 U. S. 525; Missouri Lead, etc. Co. v. Reinhard, 114 Mo. 218, 35 Am. St. Rep. 746. *Vide supra*, §§ 822a-828b; and *vide* 24 L. R. A. 322, HOLDING LANDS IN THE STATE BY FOREIGN CORPORATION.

<sup>83</sup> Page v. Heineberg, 40 Vt. 82,

94 Am. Dec. 378; St. Clara, etc. Academy v. Sullivan, 116 Ill. 375, 56 Am. Rep. 776; Lancaster v. Amsterdam Imp. Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322. <sup>84</sup> Bank of Augusta v. Earl, 13 Pet. 519.

<sup>85</sup> Carroll v. East St. Louis, 67 Ill. 567, 16 Am. Rep. 632.

<sup>86</sup> Commonwealth v. New York, etc. Co., 114 Pa. St. 340, 7 Atl. 756.

<sup>87</sup> Carroll v. East St. Louis, 67 Ill. 568, 16 Am. Rep. 632.

may take a mortgage in another State, if not there prohibited from doing so. A prohibition, against its acquiring or holding lands, does not prevent it from loaning money upon real estate security for the debt, or from foreclosing the same by suit, or sale under the mortgage or deed of transfer.<sup>88</sup> A foreign corporation, other than alien corporation, if incorporated with power to acquire and transfer real estate, may at common law buy and sell land in other States, as well as in its home State.<sup>89</sup> By the comity of States, it may so buy and sell as freely as may any individual,<sup>90</sup> subject, nevertheless, to the public policy and laws of the State.<sup>91</sup> The State may restrict or deny the right of foreign corporations to hold lands within its jurisdiction.<sup>92</sup>

*Can not be executor.*—As a corporation can act only through agents, it can not act as executor, because his duties are strictly personal and can not be delegated.<sup>93</sup> But the power to act as executor may be expressly conferred upon a foreign or domestic corporation by its charter.<sup>94</sup>

*Can not be trustee.*—For like reasons, a foreign corporation can not be a trustee, unless expressly authorized by statute. But, it may hold property in trust for purposes within the corporate power.<sup>95</sup>

**§ 1336. Statutory powers of the State.**—A corporation formed in one State may be made a domestic corporation of another State, in which it has its offices and transacts its business, notwithstanding the fiction of law that a corporation dwells only in the State of its creation, and can not migrate therefrom.<sup>96</sup> Even the power to take land by eminent domain may be given

<sup>88</sup> Ferguson c. Soden, 111 Mo. 208, 33 Am. St. Rep. 512; Caesar v. Capell, 83 Fed. 403; Stevens v. Pratt, 101 Ill. 206.

<sup>89</sup> Lancaster v. Amsterdam Imp. Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 372. *Vide supra*, § 1329.

<sup>90</sup> Cowell v. Springs Co., 100 U. S. 55.

<sup>91</sup> Christian Union v. Yount, 101 U. S. 352.

<sup>92</sup> United States v. Fox, 94 U. S. 315.

<sup>93</sup> Georgetown College v. Browne, 34 Md. 450; *In re Thompson*, 33 Barb. 334.

<sup>94</sup> Farmers', etc. Co. v. Smith (Conn. 1902), 51 Atl. 609.

<sup>95</sup> White v. Rice, 112 Mich. 403, 70 N. W. 1024.

<sup>96</sup> Young v. South Tredegar Iron Co. (1886), 85 Tenn. 189, 4 Am. St. Rep. 752. The supreme court of the United States in the case of Railroad v. Harris, 12 Wall. 82, say: "Nor do we see any reason why one state may not make a corporation of another state, as there organized and conducted, a corporation of its own *quoad hoc* any property within its jurisdiction. That this may be done was distinctly held in Ohio, etc. R. Co. v. Wheeler, 1 Black, 297."

to a foreign corporation, and a corporation, by consent of the legislature, may take this power as a *quasi* successor of another corporation to which it was originally granted.<sup>97</sup> Where, however, a State statute grants to a foreign corporation a permit to transact business in the State, no conditions can be imposed by the State which are repugnant to the constitution and laws of the United States.<sup>98</sup> In the case of river-navigation companies, it has been held that an article of a State constitution which provides that no foreign corporation shall do any business in this State without having one or more known places of business, and an authorized agent or agents in the State upon whom process can be served,—is null and void, being an attempt on the part of the State to interpose a restriction on navigation, and therefore in conflict with the provisions of an act of Congress, passed in pursuance of a clear authority under the constitution of the United States.<sup>99</sup> Concerning the provision in a constitution that “no foreign corporation shall do any business in this State, without having at least one known place of business and an authorized agent or agents therein,” it has been said that it is just as much a police regulation as a law forbidding vagrancy.<sup>1</sup> Where general laws exist, enabling foreign corporations to do business in a State, they must be complied with as to any prerequisites to engaging in business therein. And the foreign corporation must comply with all the laws of the State (in which it would do business) applicable to the case.<sup>2</sup> Accordingly, the stock of a corporation formed in another State which

<sup>97</sup> Abbott v. New York, etc. R. Co. (1888), 145 Mass. 450.

<sup>98</sup> Barron v. Burnside (1887), 121 U. S. 186; Lafayette Ins. Co. v. French, 18 How. 404; Ducat v. Chicago, 10 Wall. 410; Home Ins. Co. v. Morse, 20 Wall. 445, 456; St. Clair v. Cox, 106 U. S. 350; Philadelphia Fire Assn. v. New York, 119 U. S. 110, 120.

<sup>99</sup> New Orleans, etc. Co. v. James (1887), 32 Fed. Rep. 21; Const. La., art. 236.

<sup>1</sup> Dudley v. Collier (1889), 87 Ala. 431, 13 Am. St. Rep. 55; American, etc. Co. v. Western, etc. Co., 67 Ala. 26; Ala. Const., art. xiv, § 4.

<sup>2</sup> Gen. Laws Minn. 1889, ch. 225, provides that no corporation shall be created or organized under the

laws of the state unless the incorporators shall at or before filing the articles of incorporation pay into the state treasury the sum of \$50 for the first \$50,000, or fraction thereof, of capital stock, etc. And the court held that the provision applied to an Iowa railroad company who accepted the provisions of Gen. Laws 1877, ch. 14, that any Iowa railroad company might extend its lines into Minnesota, and have all the privileges of state companies, provided they filed copies of their articles with the secretary of state of Minnesota, and complied with the laws as to filing and recording such articles. State v. Sioux City, etc. R. Co. (Minn. 1890), 44 N. W. 1032.

has become a domestic corporation of Tennessee by complying with the law, having its general office, officers, directors, books, seal, plant and property in that State, is subject to attachment in Tennessee, although the non-resident owner has the certificates in his possession beyond the limits of her jurisdiction.<sup>3</sup> Under a statute requiring a foreign corporation doing business in that territory to file with the secretary of the territory, and with the recorder of the county in which it is carrying on business, a copy of its charter or certificate of incorporation, duly authenticated,—a copy certified under the seal of the Secretary of State of the State of the incorporation, as being a correct copy of the original on file in his office, is sufficient.<sup>4</sup> But a corporation can not take advantage of an act for granting privileges within a State, when the business of the corporation is not that contemplated by the act.<sup>5</sup>

**§ 1337. Non-compliance with the statutes. Effect on contracts. Quo warranto.**—A contract made in the State by a foreign corporation contrary to the statute is void,—so held in New Jersey as to a contract made there by a Pennsylvania corporation, inasmuch as the courts of the latter State had made the ruling.<sup>6</sup> A foreign corporation, after it has been allowed to make contracts and acquire property in the State, has the constitutional right to enforce in the State courts such contracts and property rights. No subsequent legislation by the State can deprive the corporation of its rights to enforce such contracts, or its right to such

<sup>3</sup> *Young v. South Tredegar Iron Co.* (1886), 85 Tenn. 189, 4 Am. St. Rep. 752; *Tenn. Laws*, 1877, ch. 31; *Fitzsimmons v. City Fire Ins. Co.* (1864), 18 Wis. 234, 86 Am. Dec. 761.

<sup>4</sup> *Hammer v. Garfield, etc. Co.* (1889), 130 U. S. 291.

<sup>5</sup> A Michigan act to revise the laws providing for the incorporation of companies for mining iron and other ores and minerals, and to fix the duties and liabilities of such corporations, provides that "foreign corporations, organized for the purposes contemplated by this act, upon filing copies of their charter or articles," etc., with the secretary of state and county clerk, may enjoy all the privileges,

and be subject to all the restrictions, of corporations existing under said act. Relator, a foreign corporation, was organized, not only for mining, but also, and principally, for colonizing and general trading purposes, with power to organize other corporations. And it is held that the secretary of state will not be compelled to file the relator's articles of incorporation, as it exists for purposes not contemplated by the act. *Isle Royale, etc. Co. v. Secretary of State* (1889), 76 Mich. 162, construing How. Mich. Stat. ch. 123, § 23.

<sup>6</sup> *Allegheny Co. v. Allen* (N. J. 1903), 55 Atl. 724.

property.<sup>7</sup> But the State by legislation may revoke its mere license to the corporation to do business, or may impose additional conditions.<sup>8</sup> The validity and enforceability of a contract of a foreign corporation are determined, not by its charter, but by the law of the jurisdiction within which it is made.<sup>9</sup> If the executed contract was illegal by reason of failure of the corporation to comply with the conditions precedent to its right to do business in the State, the courts will not relieve either party.<sup>10</sup> One assuming to act for a foreign corporation so delinquent, will be held personally liable on any contract made by him on its account.<sup>11</sup> Non-compliance with the conditions of doing business in a State by a foreign corporation does not render its contracts therein void.<sup>12</sup> And under the constitution of Alabama, providing that no "foreign corporation shall do any business in this State without having at least one known place of business, and an authorized agent," though the complainant, a trust company of New York, does business in Alabama without having a known place of business or authorized agent, its contracts made in the State, and relating to Alabama property, are not void, but voidable, and a plea in bar to complainant's foreclosure suit, based on such constitutional provision, is insufficient.<sup>13</sup> These constitutional provisions do not prohibit a single contract of sale by a foreign corporation to a citizen of the State, and a maintenance of an action in the State by the corporation for a breach of the contract.<sup>14</sup> But on the other hand it has been held that a broker, who,—as agent for a foreign corporation which has not complied with the act making it unlawful for a foreign corporation to do business in the State without first filing in the office of the Secretary of State

<sup>7</sup> American, etc. Assn. v. Rainbolt, 48 Neb. 434, 67 N. W. 493.

<sup>8</sup> Connecticut Mut. etc. Co. v. Sprat, 172 U. S. 602; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28.

<sup>9</sup> Ellsworth v. St. Louis, etc. Ry. Co., 98 N. Y. 553.

<sup>10</sup> Kindred v. New England, etc. Co., 116 Ala. 192.

<sup>11</sup> State v. Tumey, 81 Ind. 559.

<sup>12</sup> As where the law provides that a corporation duly incorporated under the laws of any other state may transact business in this state upon complying with the re-

quirements of that section, "but not otherwise;" and further provides that a corporation doing business in the state before complying with such requirement shall be subject to a fine, the penalty prescribed therein is exclusive of all others. Toledo, etc. Co. v. Thomas (1890), 33 W. Va. 566, 25 Am. St. Rep. 925, 11 S. E. Rep. 37.

<sup>13</sup> American, etc. Co. v. East, etc. R. Co. (1889), 37 Fed. Rep. 242; Const. Ala. art. xiv, § 4.

<sup>14</sup> Cooper Manuf. Co. v. Ferguson (1885), 113 U. S. 727.

a statement in writing, designating at least one known place of business in the State and an authorized agent thereat,—negotiates a loan from the corporation, cannot recover compensation for his services from the borrower.<sup>15</sup> And similar statutes in other States regulating the doing of business by foreign corporations have been frequently construed in accordance with these views.<sup>16</sup> The failure, however, of a foreign corporation to comply with the law providing that all foreign corporations, before doing any business within the territory, shall file with the secretary thereof, and the recorder of the county wherein they intend to transact business, a copy of their charter, and a statement,—does not preclude it from suing to recover taxes paid under protest, and alleged to have been illegal, as such action is not based upon any act or contract of plaintiff in the conduct of its business.<sup>17</sup> Nor will conveyances to such corporation be avoided so as to be subject to collateral attack.<sup>18</sup> A bill in equity, by a foreign corporation, to have a loan (evidenced by notes secured by a mortgage) declared a lien on land, which shows on its face that the loan was made by

<sup>15</sup> Dudley v. Collier (1889), 87 Ala. 431, 13 Am. St. Rep. 55.

<sup>16</sup> Dudley v. Collier (1888), 87 Ala. 431, 13 Am. St. Rep. 55, citing Cincinnati Assur. Co. v. Rosenthal, 55 Ill. 85; Aetna Ins. Co. v. Harvey, 11 Wis. 394; Hoffman v. Banks, 41 Ind. 1; Union, etc. Co. v. Thomas, 46 Ind. 44; Bank v. Page, 6 Oreg. 431; *In re Comstock*, 3 Sawy. 218; Semple v. Bank, 5 Ind. 88; Williams v. Cheney, 3 Gray, 215; Jones v. Smith, 3 Gray, 500; 2 Morawetz on Corp. (2d ed.), §§ 661-665; Thorne v. Travelers' Ins. Co., 80 Pa. St. 15.

<sup>17</sup> Powder River Cattle Co. v. Custer County (1889), 9 Mont. 145, 22 Pac. Rep. 383; Comp. Stat. Mont. div. 5, § 442.

<sup>18</sup> Const. Colo. art. xv, § 10, declares that no foreign corporation shall do business in the state without a known place of business, and agent in the state on whom process may be served. Gen. Stat. Colo. 1883, §§ 260-262, provides that before any foreign corporation shall do business in the state, it shall file with certain officers a certificate

of its place of business, and the name of its agent in the state; that "no foreign or domestic corporation established or maintained in any way for pecuniary profit of its stockholders or members shall purchase or hold real estate in this state, except as provided for in this act;" that every foreign corporation shall file with the secretary of state a copy of its charter, and of the law under which it was incorporated; and that failure to comply with the act "shall render each and every officer, agent, and stockholder of any such corporation jointly and severally liable on any and all contracts of such company made within the state during the time that such corporation is so in default." But it is held that the failure of a foreign corporation to comply with the conditions entitling it to do business in the state does not render a conveyance to it void, so that it may be attacked collaterally by a private person. Fritz v. Palmer (1889), 122 U. S. 282.

complainant in the State,—is demurrable, unless it alleges that, when the loan was made, complainants had complied with a constitutional provision requiring a foreign corporation, before doing business in the State, to file in the office of the Secretary of State an instrument in writing designating at least one known place of business in the State, and an authorized agent or agents thereat.<sup>19</sup> Compliance with the statute prohibiting a foreign corporation to hold land, can not be avoided by buying the stock of a domestic company having the power desired.<sup>20</sup>

*Proceedings to oust or exclude.*—*Quo warranto* lies against a foreign corporation, doing business in a State contrary to its statutes.<sup>21</sup> *Mandamus* does not lie to compel a foreign corporation to “qualify” to do business in the State.<sup>22</sup>

*Injunction.*—The attorney-general, in some States, may proceed in equity to enjoin a foreign corporation doing business in the State contrary to its authority.<sup>23</sup>

*In case of wrongful exclusion*, by refusal to issue permit or certificate to a foreign corporation to do business in the State, *mandamus* will lie to compel its issue, by the proper public officer where he is not by law given the discretionary power to refuse.<sup>24</sup>

**§ 1338. Comity of the States.**—Foreign corporations, by the comity of nations, are permitted to make contracts in other States and to establish agencies and carry on business and enforce their rights there, unless excluded from so doing, or unless such permission is against the policy or interest of such States.<sup>25</sup> This law

<sup>19</sup> Christian v. American, etc. Co. (Ala. 1890), 7 So. Rep. 427; Const. Ala. art. xiv, § 4; Laws Ala. 1887, Feb. 28.

<sup>20</sup> Under the Pennsylvania Act of April 2, 1855, which prohibits any corporation not incorporated under the laws of the state, from holding real estate within the commonwealth, “directly in the corporate name, or by or through any trustee or other device whatsoever,” unless specially authorized by law, a foreign corporation cannot, by purchasing the charter of a mining company, vesting the title to lands in the corporate name thereof, and procuring the issue to itself, of the stock of such mining company, become the owner of lands in the state which

it is not specially authorized to hold; and if, by such means, a foreign corporation does acquire title to lands in the state, the lands are liable to escheat by proceedings in *quo warranto* under the Act of April 26, 1855. Commonwealth v. New York, etc. R. Co. (1887), 114 Pa. St. 346.

<sup>21</sup> State v. Fidelity, etc. Co., 49 Ohio St. 440, 34 Am. St. Rep. 573.

<sup>22</sup> Secretary of State v. National, etc. Co. (Mich. 1901), 86 N. W. 124.

<sup>23</sup> State v. Schlitz, etc. Co., 104 Tenn. 715, 78 Am. St. Rep. 941, 59 S. W. 1033.

<sup>24</sup> Dwelling-House, etc. Co. v. Wilder, 40 Kan. 561; State v. Benton, 25 Neb. 834.

<sup>25</sup> Blair v. Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129. Williams

of comity is a part of the common law, and is as obligatory upon the courts, as is any other rule of the common law.<sup>26</sup> Generally corporations may enter into contracts outside of the State in which they are formed.<sup>27</sup> But comity can not extend to the point of granting to a foreign corporation, privileges which its charter does not permit it to exercise.<sup>28</sup> A corporation organized for the purpose of supplying cities with water, though not especially authorized to do business outside the State, has, by inference from its object, the right so to do.<sup>29</sup> So a corporation may hold and deal in land in another State.<sup>30</sup> Especially may it acquire land in another State in satisfaction of a debt due to it.<sup>31</sup> And it may buy at an execution sale on judgments in its favor.<sup>32</sup> And it has been decided that a mortgage on Illinois lands, taken by the United States Mortgage Company, a foreign corporation created for the business of lending money, is valid; the general incorporation law of Illinois providing that no foreign or domestic corporation established for profit shall purchase or hold real estate in the State, not preventing corporations from taking mortgages on real estate

v. Creswell, 51 Miss. 817; Newbury, etc. Co. v. Weare, 27 Ohio St. 343; Ohio, etc. Co. v. Merchants', etc. Co., 11 Humph. 7, 53 Am. Dec. 742; Alward v. Holmes (1882), 10 Abb. N. C. 96; Chapman v. Brewer, 43 Neb. 890, 47 Am. St. Rep. 779, 62 N. W. 320; Harding v. American Glucose Co., 182 Ill. 551, 74 Am. St. Rep. 1899, 55 N. E. 577.

<sup>26</sup> Cowell v. Colorado Springs Co., 100 U. S. 55; American, etc. Union v. Yount, 101 U. S. 356.

<sup>27</sup> Miller v. Ewer (1847), 27 Me. 509, 46 Am. Dec. 619; Blair v. Perpetual Ins. Co. (1847), 10 Mo. 559, 47 Am. Dec. 129. In the Maine case it was said: "If the artificial being called the Bluehill Granite Company may be considered as having existence and active life in this state by proof of its acts within her limits, it will still be true that it cannot have existence without her limits, and of course cannot make choice of officers there. It may maintain a suit without those limits, but that does not imply its existence or presence there. It may also contract

without those limits. Being within them, it may, acting *per se*, by vote transmitted elsewhere, propose a contract or accept one previously offered. And it may, by an agent or agents duly constituted, act and contract beyond those limits. But it can neither exist, nor act *per se*, without them, except by the existence of its officers or agents duly elected or appointed within them."

<sup>28</sup> Falls v. United States, etc. Co., 97 Ala. 417, 38 Am. St. Rep. 194. And in applying for privileges it must show that it has power to exercise them. Diamond Match Co. v. Powers (1884), 51 Mich. 145. *Vide supra*, § 1330, COMITY.

<sup>29</sup> Dodge v. Council Bluffs, 57 Iowa, 560.

<sup>30</sup> Though doing no business in the state where it was organized. New Hampshire Land Co. v. Tilton (1884), 19 Fed. Rep. 73.

<sup>31</sup> Columbus Buggy Co. v. Graves (1884), 108 Ill. 459.

<sup>32</sup> Elston v. Piggott (1884), 98 Ind. 14.

as security. The provision that foreign corporations doing business in the State shall have no greater powers than corporations of like charter organized under the general laws of the State, does not prevent the mortgage company from doing business in Illinois, because, although no provision is made by Illinois laws under which companies can be formed for the purpose of lending money, it is not to be inferred from that fact, nor from the language of the incorporation law (providing that "corporations may be formed, in the manner provided by this act, for any lawful purpose, except banking, insurance, real estate brokerage, the operation of railroads, and the business of loaning money") that corporations should not be formed there for the business of lending money.<sup>33</sup> The federal law, prohibiting Territorial legislatures from authorizing the organization of corporations except under general laws, does not preclude a corporation organized, under a special charter granted by a State, from doing business in a Territory.<sup>34</sup>

§ 1339. What is "doing business" in the State. Acts that are not so held.—Simply making a contract without making sales is not doing business in the State.<sup>35</sup>

"*Doing business.*"—The States generally by statute prohibit foreign corporations from "doing business" in the State before complying with certain conditions which the statute specifies, as the filing of copy of its articles of incorporation, and by-laws, and or do most of its business there. If it has any office in the State, The appointment of an agent to do business, is not the doing of business.<sup>36</sup> What constitutes the "doing business" depends upon judicial construction of the statutes, in the several jurisdictions. It is not necessary to have its principal office in the State, or do most of its business there. If it has any office in the State or no office, and does any part of its ordinary business there, that is "doing business."<sup>37</sup> It is generally construed to apply not to the making of a single contract, or the doing of a single act, but applies to continuance of business.<sup>38</sup> But the doing of a single

<sup>33</sup> Stevens v. Pratt (1882), 101 Ill. 206, Walker, J., dissenting.

<sup>34</sup> Wells v. Northern Pacific Ry. Co., 23 Fed. Rep. 469; U. S. Rev. Stat., § 1889.

<sup>35</sup> Commercial, etc. Co. v. Northampton, etc. Co. (1903), 84 N. Y. S. 38; Keene, etc. Bank v. Lawrence (Wash. 1903), 73 Pac. 680.

<sup>36</sup> Morgan & Co. v. White, 101 Ind. 413.

<sup>37</sup> People v. Wemple, 131 N. Y. 64, 27 Am. St. Rep. 542, 6 L. R. A. 303.

<sup>38</sup> Cooper Mfg. Co. v. Ferguson, 113 U. S. 727.

substantial act has been held to be doing business, as, the issue of a single policy of insurance,<sup>39</sup> a single loan of money upon mortgage security,<sup>40</sup> the acceptance of a devise of land with power of transfer, and the assertion of title thereto, etc.<sup>41</sup>

*Acts not to be held as "Doing Business."*—Those statutes do not apply to transactions in other States with persons within the State, where the transaction is no part of the corporation's ordinary business within the State,<sup>42</sup> as, among the multitude of examples, purchasing negotiable securities outside the State;<sup>43</sup> soliciting, within the State, subscriptions to the corporate stock of a foreign corporation,<sup>44</sup> receiving monthly rental upon its telephones, rented by a foreign corporation to a domestic corporation,<sup>45</sup> purchasing oil within the State for shipment to refineries of a foreign corporation in another State;<sup>46</sup> purchase by a foreign trust company of securities of a railway in the State, and taking as security, mortgage of its property;<sup>47</sup> a contract of insurance made and policy issued by a foreign insurance company, at its home office, with, and to, a resident of the State upon property in the State, although the application and payments of premium are received through an agent in the State.<sup>48</sup> A foreign railroad corporation is not doing business within the State, in a way to authorize summons upon it, when it only maintains an advertising agent, to explain advantages of the road to travelers, without power to sell tickets, or to contract on behalf of the railroad.<sup>49</sup> A foreign corporation having its officers in the State, acting only as agents for sale of goods abroad, is not doing business in the State as contemplated by the statute.<sup>50</sup> Merely bringing and prosecuting a suit by a foreign corporation concerning lands acquired by it, and which it passively holds in the State, is not carrying on business within the State.<sup>51</sup> The courts of the

<sup>39</sup> Lamb v. Lamb, 6 Biss. 420.

<sup>40</sup> Ginn v. New England, etc. Co.,

92 Ala. 135, 8 So. 388; State v. Bristol, etc., 188 Ala. 3, 54 Am. St. Rep. 131.

<sup>41</sup> Pennsylvania, etc. v. Bauerle, 143 Ill. 459, 33 N. E. 166.

<sup>42</sup> Commonwealth v. Standard Oil Co., 101 Pa. St. 119.

<sup>43</sup> Miller v. Williams (Colo.), 59 Pac. 740; Kephart v. People, 62 Pac. 946 (Colo.).

<sup>44</sup> Bartlett v. Chouteau Ins. Co., 18 Kan. 369.

<sup>45</sup> United States v. American, etc. Co., 29 Fed. 17.

<sup>46</sup> Commonwealth v. Standard Oil Co., 101 Pa. St. 119.

<sup>47</sup> Gilchrist v. Helena, etc. Co., 47 Fed. 593.

<sup>48</sup> Seamans v. Knapp-Stout, etc. Co., 89 Wis. 171, 46 Am. St. Rep. 825.

<sup>49</sup> State v. Fleming (Neb. 1903), 97 N. W. 1063.

<sup>50</sup> Rich v. Chicago (Wash. 1904), 74 Pac. 1068.

<sup>51</sup> People v. Miller (N. Y. Sup.

State are not bound to enforce such contracts, where the insurance company has not complied with the statute, as to conditions precedent to its "doing business" in the State, although the contracts are valid under laws of the "home State."<sup>52</sup> A law providing that the agents of a foreign corporation, before entering on their business as such, shall file evidence of authority with the clerks of counties where they propose to do business, does not apply to persons engaged in appointing agents to do the business of the corporation.<sup>53</sup> Nor is soliciting and receiving subscriptions for a newspaper, published by a corporation in one State, "doing business" in this State within the meaning of the constitution requiring a foreign corporation, in such a case to have a known place of business there.<sup>54</sup> So where a State constitution prohibits the taxation of callings and pursuits for State purposes, stove-range agents, selling the goods of a foreign corporation within the State can not be taxed for State purposes.<sup>55</sup> And where defendants living in Pennsylvania, agreed with a Maryland corporation, of which they were members, to can their fruit, and hold it subject to the company's order; and plaintiff bought fruit so canned from the company;—it was held that defendants were estopped to dispute plaintiff's title on the ground that the company had not complied with the law regulating foreign corporations; the agreement between defendants and the company, and the acts in pursuance of it, were not transacting business in the State, within the law regulating foreign corporations.<sup>56</sup> The prosecution or defense of an action is not doing business in the State, within the meaning of such acts.<sup>57</sup>

**§ 1340. Citizenship, residence, with reference to the power of foreign corporations. Constitutionality of statutes excluding foreign corporations.**—A corporation dwells only in the State of its creation and can not migrate therefrom.<sup>58</sup> As a cor-

1904), 85 N. Y. S. 849, 90 App. Div. 545.

<sup>52</sup> Kilgore v. Smith (1888), 122 Pa. St. 48.

<sup>53</sup> Swing v. Munson, 191 Pa. St. 582, 71 Am. St. Rep. 772.

<sup>57</sup> Christian v. American, etc. Co. (Ala. 1890), 7 So. Rep. 427.

<sup>58</sup> Morgan v. White (1885), 101 Ind. 413; Ind. Rev. Stat. 1881, §§ 3022, 3023.

<sup>56</sup> Clarke v. Bank of Mississippi (1850), 10 Ark. 516, 52 Am. Dec. 248; Ohio, etc. Co. v. Merchants', etc. Co. (1850), 11 Humph. 1, 53 Am. Dec. 742; Aspinwall v. Ohio, etc. R. Co. (1863), 29 Ind. 492, 83 Am. Dec. 329; County of Allegheny v. Cleveland, etc. R. Co. (1865), 51

<sup>54</sup> Beard v. Union & American Publishing Co. (1884), 71 Ala. 60.

<sup>55</sup> Hynes v. Briggs (1889), 41 Fed. Rep. 468, 7 Ry. & Corp. L. J. 388.

poration exists only in contemplation of law, and by force of law, it can have no legal existence beyond the State or sovereignty by which it is created.<sup>59</sup> It does not, by purchasing and operating property in another State under enabling acts of that State, become a domestic corporation therein.<sup>60</sup> But where a railroad corporation, chartered in Connecticut, bought the franchises and property of a railroad corporation created under the laws of Connecticut and Rhode Island, and the Rhode Island legislature ratified the sale and authorized the former company to exercise the rights thus acquired,—it was held that the company thus became the successor of the former company, and a Rhode Island corporation.<sup>61</sup> And where a corporation organized in Alabama obtained an act from the Mississippi legislature authorizing it to establish one or more departments under the same name in that State, (but not until citizens of that State had subscribed for a certain part of capital stock, when it should be regarded as a home company, and have all the privileges of such companies,)—this act was not a mere license for the original corporation to do business in Mississippi, but created a new corporation.<sup>62</sup> So, a corporation formed by consolidation of corporations of two States, legislation of both States authoriz-

Pa. St. 228, 88 Am. Dec. 579; Baltimore, etc. R. Co. v. Glenn, 28 Md. 287 (1868), 92 Am. Dec. 688; Phoenix Ins. Co. v. Commonwealth (1868), 5 Bush, 68, 96 Am. Dec. 331; *Vide supra*, § 106, DOMICILE OF CORPORATIONS, and *supra*, § 107a, CITIZENSHIP OF INTERSTATE CORPORATIONS, and *vide*, 24 L. R. A. 289.

<sup>59</sup> *Rece v. Newport News, etc. Co.* (1889), 32 W. Va. 164.

<sup>60</sup> *Wilkinson v. Delaware, Lackawana, etc. R. Co.*, 22 Fed. Rep. 353. So a Texas law, recognizing the existence of a corporation organized under Kansas law, and conferring on it within Texas the same rights and powers as were granted it by Kansas, within its territory, but not purporting to create a new corporate body, is merely an enabling act, and does not make it a corporation or citizen of Texas. *Missouri, etc. Ry. Co. v. Texas, etc. Ry. Co.*, 4 Woods C. Ct. 360. And the Geor-

gia charter of the Selma, Rome & Dalton Railroad, section 6, empowering the company to lease or sell its property within Georgia to any railroad company authorized by law of another state to purchase it, said purchaser to have "all the rights and privileges of this company," does not thereupon make the purchaser a corporation of Georgia. *Morgan v. East Tennessee, etc. R. Co.*, 4 Woods C. Ct. 523. And a railroad company incorporated in Maryland to build a road there which afterwards obtained a special charter in Delaware to extend its road in that state, but did nothing under that act, was held not to have become a Delaware corporation. *Philadelphia, etc. R. Co. v. Kent County R. Co.*, 5 Del. 127.

<sup>61</sup> *Clarke v. Barnard*, 108 U. S. 436.

<sup>62</sup> *Grangers' Life & Health Ins. Co. v. Kamper*, 73 Ala. 325.

ing the consolidation, is a corporation of each State.<sup>63</sup> And, conversely, a corporation, by the same name, may be chartered by two States, clothed with the same powers, and intended to accomplish the same objects, and exercise the same powers and duties in both States, but it will be two distinct corporations,—one in each State,—with only such corporate powers in each State as are conferred by its creation in that State.<sup>64</sup> For jurisdictional purposes, a corporation is a citizen of the State creating it, or within whose jurisdiction it has its domicile.<sup>65</sup> So, a corporation is a citizen in the sense the term is used in that portion of the constitution conferring jurisdiction on the United States courts, in cases between citizens of different States.<sup>66</sup> A foreign corporation, with an agent and office for the transaction of business in another State, has a legal residence where such office and agent are.<sup>67</sup> A complaint alleging that "the plaintiff is, and at the times hereinafter stated was, a banking association created by and organized under the laws of the State of New York, with its banking-house located, and principally transacting business, at the city of New York,"—sufficiently shows that plaintiff is a domestic corporation.<sup>68</sup> A corporation is "domestic" with respect to the State or country of its creation. It is a "citizen" or "resident" only of that State.<sup>69</sup> It is "domestic"

<sup>63</sup> *Burger v. Grand Rapids & Indiana R. R. Co.* (1885), 22 Fed. Rep. 561; *Colglazier v. Louisville, New Albany, etc. Ry. Co.* (1885), 22 Fed. Rep. 568; *State v. Chicago, B. & Q. R. Co.* (1888), 25 Neb. 156; *State v. Missouri Pac. R. Co.*, 25 Neb. 164 (1888); *State v. Chicago, St. P., M. & O. R. Co.* (1888), 25 Neb. 165.

<sup>64</sup> *Rece v. Newport News, etc. Co.* (1889), 32 W. Va. 164, 3 L. R. A. 572.

<sup>65</sup> See 16 Alb. L. J. 344, article by S. T. Spear, considering the citizenship of corporations in relation to suits in the federal courts, and discussing the following cases concurring in the doctrine in the text: *Bank of Augusta v. Earle*, 13 Pet. 519; *Paul v. Virginia*, 8 Wall. 168; *Bank of United States v. Deveaux*, 5 Cranch, 61; *Hope Ins. Co. v. Boardman*, 5 Cranch, 57; *Louisville, etc. R. Co. v. Leston*, 2 How.

497; *Marshall v. Baltimore, etc. R. Co.*, 16 How. 314; *Covington, etc. Co. v. Shepherd*, 20 How. 227; *Ohio, etc. R. Co. v. Wheeler*, 1 Black, 286; *Cowles v. Mercer Co.*, 7 Wall. 118; *Railway Co. v. Whittton*, 13 Wall. 270; *Gaines v. Fuentes*, 2 Otto, 10; *Insurance Co. v. Morse*, 20 Wall. 445.

<sup>66</sup> *Ducat v. City of Chicago*, 48 Ill. 172 (1868), 95 Am. Dec. 529.

<sup>67</sup> *Harding v. Chicago & Alton R. Co.* (1885), 80 Mo. 659.

<sup>68</sup> And therefore complies with Code Civil Proc. N. Y., § 1775, requiring a complaint by a corporation to state whether it is a domestic or foreign corporation, etc. *Columbia Bank v. Jackson* (1889), 4 N. Y. Supp. 433.

<sup>69</sup> *St. Louis, etc. Ry. Co. v. James*, 161 U. S. 545; *Louisville, etc. Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552; *Vide supra*, § 1329, FOREIGN CORPORATION DEFINED.

to the extent of its existence and action, under the laws of its own State, and, as to any other source of its existence or power, it is "foreign."<sup>70</sup> Statutory authority of another State to do business there, does not constitute it a domestic corporation there.<sup>71</sup> But express provision is made in some jurisdictions, that certain foreign corporations shall become domestic, by filing a copy of the corporate charter and by-laws with the Secretary of State.<sup>72</sup> A corporation created by Congress, acting as the national legislature, is domestic in any State or territory of the Union;<sup>73</sup> but when Congress acts as the legislature of the District of Columbia, or of a Territory, such corporation is a resident only of the District of Columbia or of the Territory, and in all other jurisdictions it is a foreign corporation.<sup>74</sup> A corporation created by a Territory is "domestic" there, but is "foreign" elsewhere.<sup>75</sup> A national banking corporation is domestic in the State of its location. In any other State it is a foreign corporation.<sup>76</sup>

*Constitutionality of statutes excluding foreign corporations.*—Corporations are not "citizens" entitled to the privileges and immunities of citizens in the several States, within the meaning of article 4, section 2, of the constitution of the United States.<sup>77</sup> A statute requiring foreign insurance companies to obtain a license before doing business, is not in conflict with that clause of the Constitution.<sup>78</sup> "The 'privileges' and 'immunities' secured to citizens of each State, in the several States, by that provision of the United States Constitution, are those 'privileges' and 'immunities' which are common to the citizens in the latter States, under their constitution and laws, by virtue of their being citizens. Special privileges enjoyed by citizens in their own States, are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States. They can have no such operation, except by the permission express or implied of those States. The special privileges which they confer must therefore be enjoyed at home, unless the

<sup>70</sup> *State v. Northern Central Ry. Co.*, 18 Md. 193.

<sup>71</sup> *Goodlett v. Louisville, etc. Ry. Co.*, 122 U. S. 391; *Aspinwall v. Ohio & M. Ry. Co.*, 20 Ind. 492, 83 Am. Dec. 329.

<sup>72</sup> *Debnam v. Southern, etc. Co.*, 126 N. C. 831, 36 S. E. 269.

<sup>73</sup> *Commonwealth v. Texas, etc. Ry. Co.*, 98 Pa. St. 90.

<sup>74</sup> *Daly v. National, etc. Co.*, 64 Ind. 1.

<sup>75</sup> *Adams Exp. Co. v. Denver, etc. Ry. Co.*, 16 Fed. 712.

<sup>76</sup> *National Bank, etc. v. Miller*, 15 Fed. 703.

<sup>77</sup> *Paul v. Virginia*, 8 Wall. 168.

<sup>78</sup> *McKinley v. Wheeler*, 130 U. S. 630; *Paul v. Virginia*, 8 Wall. 168.

assent of other States to their enjoyment therein be given.”<sup>79</sup> The federal constitutional provision that “no State shall deny to any person within its jurisdiction, the equal protection of its laws,” does not prevent a State from excluding foreign corporations altogether, or from imposing whatever conditions it may choose, upon permitting it to come into the State. Until it comes within the State’s jurisdiction, the corporation can not be entitled to any benefit of that constitutional provision.<sup>80</sup> A restriction upon a foreign corporation must not conflict with any provision of the United States Constitution as to jurisdiction of the federal courts;<sup>81</sup> or as to removal of causes from State to federal courts, authorized by Congress.<sup>82</sup> A State can not exclude from doing business, or impose restrictions upon, a foreign corporation which, as agent of the United States, is exercising its powers within the State.<sup>83</sup> It has been uniformly held that a corporation is not a citizen within the clause of the constitution declaring that the citizens of each State shall be entitled to all privileges and immunities of the citizens of the several States.<sup>84</sup> The privileges secured to corporations, are in the nature of special privileges, which, conferred upon individuals in their own State, are not secured to them in other States by this constitutional provision.<sup>85</sup> To the same purport, it

<sup>79</sup> Mr. Justice Field in *Paul v. Virginia*, 8 Wall. (U. S.) 168.

<sup>80</sup> *Pembina, etc. Co. v. Pennsylvania*, 125 U. S. 181.

<sup>81</sup> *People v. Fire Assn., etc.*, 92 N. Y. 311, 44 Am. Rep. 380; *Baltimore, etc. Ry. Co. v. Cary*, 28 Ohio St. 208; *Moore v. Chicago, etc. Ry.*, 21 Fed. 817.

<sup>82</sup> *Barrow, etc. Co. v. Kane*, 170 U. S. 111; *Southern Pac. Co. v. Denton*, 146 U. S. 202; *Barron v. Burnside*, 121 U. S. 186.

<sup>83</sup> *Commonwealth v. East Tenn. Coal Co.*, 97 Ky. 358, 30 S. W. 608; *Railway, etc. Co. v. Pierce*, 27 Ohio St. 155.

<sup>84</sup> *Ducat v. City of Chicago*, 48 Ill. 172 (1868), 95 Am. Dec. 529; *Cincinnati, etc. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626; *Farmers’, etc. Co. v. Harrah*, 47 Ind. 326; *Phoenix Ins. Co. v. Commonwealth*, 5 Bush, 68; *Home Ins. Co. v. Davis*, 29 Mich. 238; *People v. Imlay*, 20 Barb. 68; *Western, etc.*

*Co. v. Mayer*, 28 Ohio St. 521; *Wheeden v. Camden, etc. Co.*, 2 Phila. 23; *Bank of Augusta v. Earle*, 13 Pet. 519. Taney, C. J., in delivering the opinion of the court in *Lafayette Ins. Co. v. French*, 18 How. 404, said: “No one, we presume, ever supposed that an artificial being, created by an act of incorporation, could be a citizen of a state in the sense in which that word is used in the constitution of the United States.”

<sup>85</sup> *Paul v. Virginia*, 8 Wall. 181, where Field, J., discussing this subject, said: “Now, a grant of corporate existence is a grant of special privileges to the corporations, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. . . . Having no absolute right of recognition in other states, but depending for such rec-

has been said that the right of individuals to be a corporation and to act in a corporate capacity, is a peculiar privilege, the creation of local law, and can not by the mere force of that law exist or be exercised beyond the territorial limits of the State which enacts it.<sup>86</sup> A reason for this rule is, that otherwise the policy, interest, and desires of the weaker States, might be overwhelmed by their more potent neighbors. A favorite policy of Kentucky and some other States, against tying up lands in perpetuity, might be revolutionized by the powers and capacities of the corporations of neighboring States, to purchase and perpetually hold real estate; and this is but one of the numerous phases in which her cherished policy on various subjects, might be overwhelmed by the corporations of her neighbors, if they were to be regarded as citizens and within the protection of the constitution and thereby beyond the discriminating control of the State legislature.<sup>87</sup> A foreign corporation does not acquire residence in a State by reason of its license to do business there. It retains its residence in the State of its creation.

The right of a citizen of one State to all the privileges and immunities of citizens of other States, under the federal constitution, are limited to natural persons, and do not extend to corporations as citizens of the State where created. The privileges of such a corporation to do business in another State, is permitted by comity alone, and does not rest upon any natural right;—being an artificial person it has no natural rights.<sup>88</sup>

**§ 1341. Legal residence with reference to the right to sue.—**A corporation created by a State is a citizen of that State within the meaning of the constitution and statutes defining the jurisdiction of the federal courts,<sup>89</sup> even if all its business is transacted

ognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely. They may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

<sup>86</sup> Commonwealth v. Milton, 12 B. Mon. 212, 54 Am. Dec. 522.

<sup>87</sup> Phoenix Ins. Co. v. Commonwealth (1868), 5 Bush, 68.

<sup>88</sup> Baltimore, etc. v. Koontz, 104 U. S. 5; Rece v. Newport News, etc. Co., 32 W. Va. 164, 3 L. R. A. 572, 9 S. E. 212.

<sup>89</sup> State of Wisconsin v. Pelican Ins. Co. (1888), 127 U. S. 265. Where a citizen of Louisiana brings suit in the state court against a corporation, alleging that defendant is incorporated under the laws of the state, an affidavit for removal to the fed-

elsewhere, and all of its offices and places of business are outside of the State.<sup>90</sup> And the members of a foreign corporation, where it sues or is sued in a United States court, are conclusively presumed to be citizens of the State or country which created it.<sup>91</sup> An allegation that a corporation is doing business in a certain State, does not necessarily import that it was created by the laws of that State, and is a citizen thereof.<sup>92</sup> So also the buying and making use of property by a corporation in another State than that in which it was incorporated, under enabling acts of that State, does not make it a corporation of the latter.<sup>93</sup> It has been decided that a corporation created by the consolidation of several corporations existing in different States, (by an act of the legislature, which provided that it should be treated as a corporation created by the laws of the State authorizing the consolidation,) is, as concerns a suit against it by an alien, a citizen of that State, and not entitled to a removal of the suit under the local-prejudice clause of the Removal of Causes Act.<sup>94</sup> And when the charter of a corporation in one State is duplicated in another State, and the legislature assumes to create a home corporation, the effect is to consolidate the two; but for purposes of jurisdiction, it is a separate corporation within the State of its adoption. In such a case separate organization is not necessary.<sup>95</sup> "Citizen," as used in the United States constitution, does not apply to corporations. For purposes of suit against a foreign corporation in the federal courts, all its stockholders are conclusively presumed to be citizens of the State which by its laws created the corporation.<sup>96</sup>

eral court, on the ground of diverse citizenship of the parties, which merely alleges that the corporation is a citizen of another state, and does not allege that the corporation is not domiciled in Louisiana, is insufficient. *Guinault v. Louisville, etc. R. Co.*, 6 So. Rep. 850 (La. 1890).

<sup>90</sup> *Pacific R. Co. v. Missouri Pac. Ry. Co.* (1885), 23 Fed. Rep. 565.

<sup>91</sup> *National S. S. Co. v. Tugman*, 106 U. S. 118. A corporation cannot acquire a residence in a state other than one in which it is incorporated, within the meaning of the act of congress which provides that, "when the jurisdic-

tion is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either plaintiff or defendant." *Booth v. St. Louis, etc. Mfg. Co.* (1889), 40 Fed. Rep. 1.

<sup>92</sup> *Brock v. Northwestern Fuel Co.* (1889), 130 U. S. 341.

<sup>93</sup> *Wilkinson v. Delaware, etc. R. Co.*, 22 Fed. Rep. 353.

<sup>94</sup> *Cohn v. Louisville, etc. R. Co.*, 39 Fed. Rep. 227.

<sup>95</sup> *Blackburn v. Selma, etc. R. Co.*, 2 Flip. 525, 3 Fed. Cas. 526.

<sup>96</sup> *St. Louis & S. F. R. R. v. James*, 161 U. S. 545.

*In the case of corporations of different States.*—Where in the case of consolidation the component corporations are domiciled in different States, any one of them may have a domicile in two or more States, but for the purpose of suit, it is a citizen of the State, where it is sued, whatever its *status* may be as to citizenship elsewhere.<sup>97</sup>

§ 1342. A foreign corporation cannot exercise the power of eminent domain.—A foreign corporation can not condemn lands under the general railroad law of a State, without obtaining special legislative authority.<sup>98</sup> Some constitutions provide that no foreign corporation may condemn land, or appropriate private property.<sup>99</sup> So foreign railways can not exercise the power of eminent domain to acquire a right of way or hold real estate, in Nebraska until duly incorporated by that State.<sup>1</sup> Under that constitution a foreign corporation, which has not become a corporation under the laws of Nebraska, can not avail itself of the services of another corporation to acquire a right of way, and it may be enjoined from appropriating property for that purpose.<sup>2</sup> In that State, only railroad companies organized under its laws, can condemn a right of way across lands owned by the State.<sup>3</sup> In New York, foreign corporations, however, are entitled to the benefit of an act which provides for the acquisition of additional lands found to be necessary for the operation of a railway subsequently to its construction.<sup>4</sup> And so, it was held that they are entitled to the benefit of an act which provides that “if at any time after the construction of any railroad operated by steam, by any company now existing, or that may hereafter be created, such company, or any company owning, operating, or leasing such railroad, or any mortgagee in possession of such railroad, or person appointed as receiver of any such railroad, and in the possession of and operating the same, shall require, for the purposes of its incorporation, or for the purpose of running or operating any railroad so owned, any real estate in addition to what has been already required for the purposes of such railroad, the necessary lands

<sup>97</sup> National S. S. Co. v. Tugman, 106 U. S. 118; *Vide supra*, §§ 106, 1340.

<sup>98</sup> Holbert v. St. Louis, etc. R. Co., 45 Iowa, 23.

<sup>99</sup> Ark. Const. (1874), art. xii, § 11.

<sup>1</sup> Neb. Const. (1875), art. xi, § 8.

<sup>2</sup> Koenig v. Chicago, B. & Q. R.

Co. (1889), 27 Neb. 699, 43 N. W. Rep. 423.

<sup>3</sup> State v. Scott (1888), 22 Neb. 62, 36 N. W. Rep. 121; Comp. Stat. Neb. 1887, ch. 72, art. 11.

<sup>4</sup> *In re Marks* (1887), 6 N. Y. Supp. 105, construing N. Y. Laws of 1850, ch. 140, as amended by N. Y. Laws of 1881, ch. 649.

may be acquired in the manner therein provided."<sup>6</sup> Without express authority, a foreign corporation has no right to exercise the power of eminent domain. This power may not be exercised under the rule of *cōfiniti*.<sup>6</sup> The legislature, unless prohibited by the constitution, may extend the right of eminent domain to foreign corporations, as fully as it may confer it upon domestic corporations.<sup>7</sup> The power is expressly denied to foreign corporations, by constitution, or statute, in some jurisdictions.<sup>8</sup>

**§ 1343. Jurisdiction of the courts generally. Visitation.**—Visitorial power of the courts over a foreign corporation, belongs exclusively to its home State, to regulate its internal affairs and management, notwithstanding any agreement made to submit to the jurisdiction of the courts, in suits against it in the State in which it is allowed to do business.<sup>9</sup> "Our courts, possess no visitorial power over a foreign corporation, and can enforce no forfeiture of charter for violation of law, or removal of officers for misconduct; nor can they exercise authority over the corporate functions, the by-laws, or the relations between the corporation and its members, arising out of, and depending upon, the law of its creation. These powers belong only to the State which created the corporation."<sup>10</sup> The courts have no power over a foreign corporation to regulate, or interfere with, the management of its internal affairs, and can not appoint a receiver of its assets generally,<sup>11</sup> or compel distribution of assets.<sup>12</sup> But where it may be done without such interference with internal affairs, the courts may enforce the rights of creditors as to corporate property within the State,<sup>13</sup> and may enforce individual rights of stockholders,<sup>14</sup>

<sup>5</sup> *In re Marks* (1889), 6 N. Y. Supp. 105; N. Y. Laws of 1881, ch. 649, amending N. Y. Act of April 2, 1850.

<sup>6</sup> *Abbott v. New York, etc. Co.*, 145 Mass. 450, 15 N. E. 91.

<sup>7</sup> *Southwestern Ry. Co. v. Southern, etc. Co.*, 46 Ga. 43, 12 Am. Rep. 585.

<sup>8</sup> *St. Louis, etc. Co. v. Foltz*, 52 Fed. 627.

<sup>9</sup> *Sidway v. Missouri, etc. Co.*, 101 Fed. 481; *Wineburgh v. United States, etc. Co.*, 173 Mass. 60, 73 Am. St. Rep. 261; *Vide supra*, § 922, VISITATION.

<sup>10</sup> *North, etc. Min. Co. v. Field*, 64 Md. 151, 20 Atl. 1039.

<sup>11</sup> *Stafford v. American Mills Co.*, 13 R. I. 310; *Leary v. Columbia, etc. Co.*, 82 Fed. 777; *Sidway v. Missouri, etc. Co.*, 101 Fed. 481.

<sup>12</sup> *Redmond v. Enfield Mfg. Co.*, 13 Abb. Pr. (N. S. N. Y.) 332.

<sup>13</sup> *Security, etc. Assn. v. Moore*, 151 Ind. 174; *Buswell v. Order, etc.*, 161 Mass. 224, 23 L. R. A. 846, 36 N. E. 1065; *Holbrook v. Ford*, 153 Ill. 633, 46 Am. St. Rep. 917, 27 L. R. A. 324, 39 N. E. 1091.

<sup>14</sup> *Condon v. Mutual, etc. Assn.*, 89 Md. 99, 73 Am. St. Rep. 169; *North, etc. Co. v. Field*, 64 Md. 151, 20 Atl. 1039.

as, to compel the officers to permit the inspection by a stockholder of the corporate books within the State,<sup>15</sup> or issue to him a new certificate of stock in place of one lost,<sup>16</sup> or to enforce the liability of stockholders generally on their subscription to the capital stock.<sup>17</sup> Jurisdiction over corporation, foreign or domestic, can be secured by the courts only in the manner prescribed by statute.<sup>18</sup> A court acquires no jurisdiction of a foreign corporation by service of summons on its officers, or directors, in a State where it is not doing business, and has no office.<sup>19</sup>

**§ 1344. Suits by and against foreign corporations.**—A foreign corporation, the same as any other non-resident, may bring a suit upon a contract made in a foreign State, without compliance with the law as to filing a certificate by a foreign corporation.<sup>20</sup> An English corporation may bring suit in the courts of Kansas.<sup>21</sup> Garnishee process does not lie against a foreign corporation to attach money due from it to a non-resident.<sup>22</sup> A foreign corporation engaged in interstate commerce, may sue in a State court, without compliance with State laws permitting it to do business in the State.<sup>23</sup> A foreign corporation has no citizenship in any other State than that of its creation. Everywhere else it is a non-resident. There only, under the common law, could it sue or be sued, but the rule gave way to what is called the comity of States, which allows a foreign corporation to sue or be sued, in its courts. In some States, statutes regulate the subject. In Massachusetts a foreign corporation may be sued by a resident.<sup>24</sup> In New York no foreign corporation, without express authority to do business there, can sue on any contract made there. Exception is made in

<sup>15</sup> *Swift v. State*, 7 Houst. (Del.) 338. See *Swift v. Richardson*, 32 Atl. 143.

<sup>16</sup> *Guilford v. Western, etc. Co.*, 59 Minn. 332, 50 Am. St. Rep. 407.

<sup>17</sup> *Holbrook v. Ford*, 153 Ill. 633, 46 Am. St. Rep. 917, 27 L. R. A. 324.

<sup>18</sup> *Coolidge v. American, etc. Co.* (1904), 86 N. Y. S. 318, 91 App. Div. 14.

<sup>19</sup> *Martin v. New Trinidad, etc. Co.* (N. Y. 1904), 130 Fed. 394 (U. S. C. C.).

<sup>20</sup> *Western, etc. Co. v. Anderson* (Tex. 1904), 79 S. W. 916.

<sup>21</sup> *Colonial, etc. Co. v. Catlin*, 57 Pac. 140 (Kan. 1899).

<sup>22</sup> *Strauss v. Aetna, etc. Co.*, 126 N. C. 223 (1900), 35 S. E. 471, 48 L. R. A. 452; *American Cent. Ins. Co. v. Hettler* (1893), 37 Neb. 849, 56 N. W. 711, 40 Am. St. Rep. 522; *Reimers v. Seatco Mfg. Co.*, 70 Fed. 573 (1895); *Douglas v. Phoenix Ins. Co.* (1893), 138 N. Y. 209, 20 L. R. A. 118; *Associated Press v. United Press* (1898), 104 Ga. 51, 29 S. E. 869; *National Bank, etc. v. Furtick* (Del. 1897), 2 Marvel, 35; *Louisville, etc. R. R. v. Steiner* (Ala. 1900), 30 So. 741.

<sup>23</sup> *Zion, etc. Assn. v. Mayo*, 22 Mont. 100 (1899), 55 Pac. 915.

<sup>24</sup> *Youmans v. Minn., etc. Co.*, 67 Fed. 282 (1895).

favor of foreign banks.<sup>25</sup> But upon a contract made in another State, a foreign corporation without any authority to do business, may sue in the New York courts.<sup>26</sup> A non-resident can not sue a non-resident there, unless the contract was made there, or was to be performed there.<sup>27</sup> A foreign corporation may sue in Nebraska.<sup>28</sup>

**§ 1345. Whether the suit is to be brought at law, or in equity.** A suit against directors for negligence or wrongful act (when brought by a stockholder) should be in equity, and not a suit at law.<sup>29</sup> The direct suit at law will not lie by a stockholder to hold liable for fraud another corporation owning a majority of the stock of his own corporation, and for having diverted its business and induced its insolvency.<sup>30</sup> A stockholder's suit will not lie at law, against a director for mismanagement of the corporation.<sup>31</sup> A stockholder's remedy against directors for negligence is in equity,<sup>32</sup> or for wilful waste by the director.<sup>33</sup> Where land was sold under a corporate mortgage which did not cover the land, a stockholder's remedy for its recovery in behalf of the corporation, is at law, and not in equity, unless it is to have a receiver appointed to recover the land.<sup>34</sup> The proper remedy for negligence of the directors or other officers, to the damage of the corporation, is an action at law by the corporation itself.<sup>35</sup>

**§ 1346. Equity jurisdiction of foreign corporations.**—A court of equity has jurisdiction to remedy *ultra vires* acts of a foreign corporation, or of its directors or officers, when the acts were committed within the court's jurisdiction, or when some of the parties reside within it. A New York stockholder in an Illinois corporation may bring suit in New York to set aside a wrongful sale of all the assets.<sup>36</sup> An American stockholder in an English company,

<sup>25</sup> Anglo-Am., etc. Co. v. Davis, etc. Co. (1902), 169 N. Y. 506, 88 Am. St. Rep. 608.

<sup>26</sup> Batchelder, etc. Co. v. Knopf (1900), 54 N. Y. App. Div. 329.

<sup>27</sup> Robinson v. Oceanic, etc. Co. (1889), 112 N. Y. 315, 2 L. R. A. 636, 19 N. E. 625.

<sup>28</sup> Schmidt v. Manning (1900), 60 Neb. 201, 82 N. W. 99.

<sup>29</sup> Niles v. New York, etc. R. R. (1902), 69 N. Y. App. Div. 144; Smith v. Hurd (1847), 53 Mass. 371, 46 Am. Dec. 690; Eldred v. Ripley (1901), 97 Ill. App. 503.

<sup>30</sup> Howe v. Barney (1891), 45 Fed. 668.

<sup>31</sup> Sales v. White (1897), 18 N. Y. App. Div. 590; Bloom v. National, etc. Co. (1894), 81 Hun, 126.

<sup>32</sup> Hirsh v. Jones (1893), 56 Fed. 137.

<sup>33</sup> Thompson v. Stanley (1892), 20 N. Y. Supp. 317.

<sup>34</sup> Knevals v. Florida, etc. R. R. (1894), 66 Fed. 224.

<sup>35</sup> Empire State, etc. v. Beard (1896), 151 N. Y. 638.

<sup>36</sup> Whitman v. Holmes, etc. Co. (1900), 33 N. Y. Misc. Rep. 47.

organized to acquire, and work American mines, may by suit in an American court have set aside a reorganization made in England, contrary to the company's by-laws.<sup>37</sup> A stockholder may file a bill to compel the executor of the deceased president of a foreign corporation to restore corporate property misappropriated by the president.<sup>38</sup> A stockholder of an English corporation, owning land in Louisiana which it sold at one-seventh of its value, involving loss of over two million dollars to the corporation, may maintain suit in Louisiana for appointment of a receiver to have the sale set aside where the directors refuse to act.<sup>39</sup> The holder of stock in a New Jersey corporation may maintain a suit in New York to compel the majority stockholders there to return to the corporation, for cancellation, stock which to a large amount was illegally and without consideration issued to them.<sup>40</sup> A citizen of Mexico may maintain a suit in Texas against an Illinois corporation for breach of contract, although the property of the corporation is in the possession of a receiver appointed in Mexico.<sup>41</sup> *Mandamus* will not lie in any State, by directors in a foreign corporation, to command other persons to refrain from acting as directors, although all the parties are residents.<sup>42</sup> A West Virginia court will not enjoin a New York corporation from imposing illegal assessments.<sup>43</sup> A New Jersey court will not entertain suit by a New York bondholder against a trust company of New York, to hold it liable for illegally certifying bonds issued by a New York corporation.<sup>44</sup> A court will refuse to exercise its jurisdiction of a suit affecting a foreign corporation, where the more proper forum is a court of the State in which it is incorporated, and so a New York court will not, on motion of the New York stockholder, in an Arizona mining company, enjoin it from transferring its property in Arizona—and appoint a receiver.<sup>45</sup> A non-resident stockholder can not enjoin a foreign corporation from *ultra vires* transferring its property to another foreign corporation.<sup>46</sup> A

<sup>37</sup> Brown v. Republican, etc. Mines (1893), 55 Fed. Rep. 7.

<sup>38</sup> Winburg v. United States, etc. Co. (1899), 173 Mass. 60.

<sup>39</sup> Watkins v. North America, etc. Co. (La. 1902), 31 So. 683.

<sup>40</sup> Ernest v. Rutherford, etc. Co. (1899), 38 N. Y. App. Div. 388.

<sup>41</sup> American, etc. Works v. De Aguayo (Tex. 1899), 53 S. W. 350.

<sup>42</sup> Wason v. Buzzell, 63 N. E. Rep. 909 (Mass. 1902).

<sup>43</sup> Taylor v. Mutual, etc. Assn. (1899), 97 Va. 60, 33 S. E. 385, 45 L. R. A. 621.

<sup>44</sup> Polhemus v. Holland, etc. Co. (1900), 59 N. J. Eq. 93, 45 Atl. 534.

<sup>45</sup> Hallenborg v. Greene, 66 N. Y. App. Div. 590 (1901).

<sup>46</sup> Small v. Minneapolis, etc. Co. (1890), 10 N. Y. Supp. 456.

Massachusetts court will not entertain a suit by stockholders of a Missouri corporation, to enjoin its issue of bonds secured by mortgage on property in Missouri. The court said: "It would be a misuse of our powers to attempt to control the action of those courts in a case like this, by adjudication which would depend upon them for enforcement and which they might say, had mistaken the Missouri law."<sup>47</sup> A stockholder's suit in behalf of a corporation, must join as plaintiffs all those stockholders who wish to be plaintiffs in the suit, because the parties interested are numerous, and the suit is for an object, common to them all, and the bill must be filed in behalf of all.<sup>48</sup> A stockholder will not be allowed to maintain a suit to compel another corporation to accept a deed of land from his own, and issue stock in payment for it, where the suit is not in behalf of the corporation, but really in behalf of the plaintiff stockholder.<sup>49</sup> Where an improvement company agrees with the purchasers of lots from the company that its profits will be applied to their improvement, the agreement may be enforced by one lot-purchaser by suit in behalf of all.<sup>50</sup>

**§ 1347. Service of process upon foreign corporations.**—Whether a corporation is subject to service of process in a personal action, elsewhere than in the State of its domicile, is a question not of local but of general law. To be so subject to service in a State other than that by which it was created, it must actually be doing business there, and the service must be upon an agent lawfully authorized to accept service of such process.<sup>51</sup> Where the question is one of fact as to maintaining an office and doing business, it is for a jury to determine.<sup>52</sup> Delivery of copy of notice and complaint by the sheriff of the foreign State to the secretary of the foreign corporation, is not a legal service on the corporation.<sup>53</sup> The corporation is not doing business in the State, for sufficient purpose of service upon an officer of the corporation, temporarily in the State for the purpose of hiring an engineer.<sup>54</sup>

<sup>47</sup> Kimball v. St. Louis, etc. R. R. (1892), 157 Mass. 7, 34 Am. St. Rep. 250.

<sup>48</sup> Jefferson, etc. Bank v. Francis (1898), 115 Ala. 317, 23 So. 48.

<sup>49</sup> Collier v. Dearing, etc. Assn. (Ky. 1902), 66 S. W. Rep. 183.

<sup>50</sup> Whiting v. Elmira, etc. Assn., 45 N. Y. App. 349.

<sup>51</sup> Frawley, etc. v. Penn., etc. Co.

(1903), 124 Fed. 259; *Vide supra*, § 998, SERVICE OF PROCESS ON FOREIGN CORPORATION.

<sup>52</sup> Andenreid v. East, etc. Co. (1903), 124 Fed. 697.

<sup>53</sup> Steel v. Schaffer (1903), 107 Ill. App. 320.

<sup>54</sup> Schillinger Bros. Co. v. Henderson, etc. Co. (1903), 107 Ill. App. 335.

Service is insufficient where made upon the agent, of a foreign newspaper corporation, employed only to solicit advertising.<sup>55</sup> Under the New York Code, service can not be made upon an alleged managing agent of a foreign corporation, where it has no property within the State.<sup>56</sup> Where it does not appear that at the time of service the corporation was doing business in the State, a federal court will not entertain jurisdiction of a suit in equity, although return of process shows service upon a corporate officer.<sup>57</sup> Service of summons made upon a foreign corporation in Alaska is sufficient, where the service is made upon the agent who receives, and stores, and sells, and is responsible to the corporation for, merchandise of the corporation.<sup>58</sup> Under the revised statutes of Missouri, a return of service of summons on a foreign corporation, is insufficient, which merely recites delivery of a copy to the president, but fails to show that the corporation has any officer or place of business in the State.<sup>59</sup> By service upon its appointed resident-agent, jurisdiction is acquired over a foreign corporation, upon its contracts made, or business done within the State.<sup>60</sup> Service can not be made upon its traveling-agents in the State, who have no power to make contracts for the corporation,<sup>61</sup> nor upon its president, without his consent, who was in the State only to give testimony as a witness.<sup>62</sup> Service upon the president of the United States, may be made anywhere within its jurisdiction, in a suit affecting a corporation incorporated under the laws of Congress.<sup>63</sup> Although a foreign corporation has no appointed agent in the State authorized to accept service of process, service may be made in the State upon the general manager of the corporation.<sup>64</sup> Where the statute allows service upon any foreign corporation to be made upon "any local agent," the phrase means an agent at a given place, or appointed for a certain district, and not one who is appointed for the State at large.<sup>65</sup> Jurisdiction over a foreign

<sup>55</sup> *Fontana v. Post, etc. Co.*, 84 N. Y. S. 308 (1903).

<sup>56</sup> *Fontana v. Post, etc. Co.*, 84 N. Y. S. 308 (1903).

<sup>57</sup> *Central, etc. Exchange v. Board of Trade, etc.* (1903), 125 Fed. 463.

<sup>58</sup> *American, etc. Co. v. Giant Powder Co.* (1902), 1 Alaska, 664.

<sup>59</sup> *Walter A. Zellnicker Supply Co. v. Mississippi, etc. Co.* (Mo. 1903), 77 S. W. 321.

<sup>60</sup> *St. Clair v. Cox* (1882), 106 U. S. 350.

<sup>61</sup> *Wall v. Chesapeake, etc. Ry.* (1899), 95 Fed. Rep. 398.

<sup>62</sup> *Weston v. Citizens' etc. Bank* (1901), 64 N. Y. App. Div. 145.

<sup>63</sup> *Eby v. Northern Pac. R. R.* (1879), 13 Phila. 144.

<sup>64</sup> *Henrietta Mining, etc. Co. v. Johnson* (1899), 173 U. S. 221.

<sup>65</sup> *MacMillan Co. v. Stewart* (N. J. Law, 1903), 56 Atl. 1132.

corporation is acquired by service within the State, upon its officers or agent specified in the statutes, which, in most States provide for such service. Generally a foreign corporation is required to appoint a resident-agent with authority to accept service before it may be authorized to do business within the State. Where such appointee has ceased to be the company's agent for that purpose, service upon him is not good service upon the corporation.<sup>66</sup> Suit against a foreign corporation may be brought in any county in the State.<sup>67</sup> Valid service upon foreign corporations may be made upon their managing agents, under the New York Code.<sup>68</sup> In that State, a general agent of the passenger department of a foreign railway, may be served with process intended for the corporation.<sup>69</sup> And in a local action for penalties, for stamping articles as patented, (without license,) recoverable only in the district where the stamping is done, an agent of a foreign corporation who has the general management and control, within the district, of the manufacturing business in the course of which the stamping is done,—is a "managing agent" of the corporation within the meaning of the Code, and service upon him is a valid service upon the corporation.<sup>70</sup> So also, service upon a managing agent for a State, of a foreign corporation, is sufficient under acts providing that service may be made upon local agents in the county where the suit is brought.<sup>71</sup> Again, where service upon an agent simply,—is prescribed, the person—to whom the foreign corporation commits the management and control of its business in executing a building contract—is well served.<sup>72</sup> An agreement by a foreign corporation and an individual who is to sell its manufactures in a certain county in another State, makes him its agent within the statutes regulating the service of process.<sup>73</sup> And the agency will not be regarded as terminated upon the last day of the term of the agreement, as to a third party who has bought a machine of the agent, when there has been no final settlement with, and discharge of,

<sup>66</sup> *Forrest v. Pittsburgh, etc. Co.* (1902), 116 Fed. 357; *Friedman v. Empire, etc. Co.* (1899), 101 Fed. 535.

<sup>67</sup> *Boyer v. Northern, etc. Ry.*, 66 Pac. 826 (Idaho, 1901).

<sup>68</sup> *E. g. N. Y. Code Civ. Proc.*, § 432.

<sup>69</sup> *Tuchband v. Chicago, etc. R. Co.* (1889), 115 N. Y. 437.

<sup>70</sup> *Hat-Sweat Mfg. Co. v. Davis, etc. Co.*, 31 Fed. Rep. 294.

<sup>71</sup> *Societe Fonciere et Agricole v. Milliken* (1890), 135 U. S. 304; *Tex. Rev. Stat.*, art. 1223.

<sup>72</sup> *Norton v. Berlin, etc. Co.*, 51 N. J. 442.

<sup>73</sup> *Gross v. Nichols* (1887), 72 Iowa, 23; *Brunson v. Nichols*, 72 Iowa, 763 (1887).

the agent.<sup>74</sup> It has been held, that under a statute providing that in the absence of the principal officers of a foreign corporation, service may be made on a managing agent "within the State," service on the general manager of a foreign corporation, while within the State temporarily, and not performing the duties of his office, is sufficient.<sup>75</sup> But in an action by a resident of New York against a foreign corporation, which does not do business, or have office, agent, or property within that State,—service of process upon an officer of the corporation, while temporarily there, does not confer jurisdiction upon the court from which it issued.<sup>76</sup> And, under an act of Congress which declares that "no civil suit shall be brought against any person by any original process in any other district than that whereof he is an inhabitant or in which he shall be found," a corporation can not be served with process outside of the State where it was created.<sup>77</sup> Where a foreign corporation had appointed the commissioner of corporations to be its attorney, on whom process might be served pursuant to the statute, and its attorney in the suit accepted service to the same extent that the plaintiff would have obtained service by leaving a copy of the writ with the commissioner of corporations, it was held that the service was sufficient to give jurisdiction to render a personal judgment against defendant.<sup>78</sup> A plea in abatement, in an action commenced

<sup>74</sup> Gross v. Nichols (1887), 72 Iowa, 23; Brunson v. Nichols, 72 Iowa, 763 (1887). In Sturgis v. Crescent Jute Mfg. Co. (1890), 10 N. Y. Supp. 470, it appeared that prior to the service of summons upon one B., as officer or managing agent of defendant, a foreign corporation, under N. Y. Code Civil Proc., § 432, B. had resigned his position of president of the corporation, and he made affidavit that subsequently he sustained no relation to defendant except as a member of a firm which was under contract to sell defendant's goods and to advance moneys to defendant. On the day of the service of summons B. gave directions as to the disposition of certain property consigned to defendant, but with the directions B. communicated the fact of his resignation. And the court decided

that the service could not be sustained.

<sup>75</sup> Porter v. Sewall Safety Car-Heating Co., 7 N. Y. Supp. 166; New York Code Civ. Proc., § 432, subd. 3.

<sup>76</sup> Golden v. The Morning News (1890), 42 Fed. Rep. 112.

<sup>77</sup> Hume v. Pittsburgh, etc. Ry. Co., 8 Biss. C. Ct. 81.

<sup>78</sup> Wilson v. Martin-Wilson, etc. Co. (1889), 149 Mass. 24. An appointment by a foreign insurance company of the superintendent of the insurance department as its attorney, on whom process for the commencement of actions may be served as required by the statute, is valid, although the appointment is of the superintendent and "his successor in office," described only by his official title, and not by his individual name. The appointment, being authorized by a

in the State court against a foreign corporation, showed that the writ was not properly served as a writ of summons, but the writ and return showed that the writ issued and was served as a writ of attachment. And it was held, that as the plea did not deny that the person with whom the copy was left was defendant's known agent or attorney, or that it was left with him at the place of attachment, it was bad, such service being authorized by the State laws.<sup>79</sup> Under the statutory provision that service of process "can be made under a foreign corporation only, either when it has property within the State, or the cause of action exists in favor of a resident of the State," it is not necessary, in order that the court may obtain jurisdiction in an action against it, for an allegation to be made setting forth the existence of some one of these facts, and a failure to do so will not be sufficient ground to sustain a demurrer.<sup>80</sup> In Missouri, the law for the service of corporations places them on the same footing as individuals, and authorizes a general judgment against the party served.<sup>81</sup> Service must be made upon some agent who is transacting within the State, business of the foreign corporation. This is required under the Minnesota statute, and the act of Congress. A foreign publishing corporation with no other business in Minnesota than circulation of its periodical by mail, and represented only by traveling solicitors for advertising, not authorized to make definite contracts, is not "doing business" in the State, and such solicitor is not an "agent" upon whom process can be served to bind such foreign corporation under the Minnesota statute.<sup>82</sup> A return of service upon a foreign corporation is *prima facie* insufficient, which does not recite that the corporation is doing business in the State.<sup>83</sup> Service of process upon the attorney of a foreign corporation, incidentally traveling through the State, is insufficient, the corporation having no agency

formal resolution of the directors, and signed by the president and secretary, with the corporate seal affixed, and its execution acknowledged and proved before a notary, is sufficiently certified and authenticated to fulfill the requirements of the act, which does not provide that the appointment be authenticated in any particular manner. *Lafflin v. Travelers' Ins. Co.* (1890), 12 N. Y. 713.

<sup>79</sup> *Shampeau v. Connecticut*, etc.

Co. (1889), 37 Fed. Rep. 771, construing Vt. Rev. Stat., § 881.

<sup>80</sup> *Friezen v. Allemania, etc. Ins. Co.*, 30 Fed. Rep. 349, construing Wis. Rev. Stat., § 2637, subd. 11.

<sup>81</sup> *McNichol v. United States Mercantile Reporting Agency*, 74 Mo. 457 (1882).

<sup>82</sup> *Boardman v. S. S. McClure Co.* (1903), 123 Fed. 614.

<sup>83</sup> *Jackson v. Delaware, etc. Co.* (1904), 131 Fed. 134 (U. S. C. C.).

in the State, or property there, and doing no business there.<sup>84</sup> A foreign corporation authorized to do business in the State, can not be enjoined at suit of the State, from performance of contracts made before the granting of such authority. They are not for that reason unenforceable.<sup>85</sup> The agent in the State, upon whom service of process may be made to bind a foreign corporation, must sustain such relation to the matter by reason of his employment as would make it his duty to report the fact of service to his principal or employer.<sup>86</sup> Return of service is insufficient which states that service was left with a person serving as an officer of the company, stating that he was "resident agent" of defendant company.<sup>87</sup>

§ 1347a. What is "doing business" in the State so as to make service of process there effectual.—Under the statute limiting suits to foreign corporations doing business within a State, the purchasing of raw material in a city thereof by correspondence or by sending an agent, is not such doing business as will make a service, in that city of the managing agent of the corporation there upon a pleasure trip, effectual.<sup>88</sup> And under the federal statute it is always for the federal court to determine whether a non-resident corporation has transacted business to such an extent within the district, and has such a representative or agent therein, that jurisdiction to render a personal judgment against the corporation may be acquired by service on that agent.<sup>89</sup> A State statute, providing for service upon foreign corporations doing business in the State, does not repeal a former one regulating the service upon them when having local agents.<sup>90</sup> But the mere fact that a corporation has sent its property in the charge of its agents into a foreign State for the purpose of exhibition and advertisement, does not constitute such a carrying on of business there as to subject it to being served with process.<sup>91</sup>

<sup>84</sup> London, etc. Co. v. American, etc. Co. (Iowa, 1904), 127 Fed. 1008 (U. S. C. C.).

<sup>85</sup> State v. American Book Co. (Kan. 1904), 76 Pac. 411; Hamilton v. Reeves & Co. (Kan. 1904), 76 Pac. 418; Tanner v. Nichols, 80 S. W. 225 (Ky. 1904).

<sup>86</sup> Strain v. Chicago, etc. Co., 126 Fed. 831 (U. S. C. C., Mo. 1903).

<sup>87</sup> Roake v. Pennsylvania R. Co. (N. J. Sup. 194), 57 Atl. 160.

<sup>88</sup> St. Louis, etc. Co. v. Consolidated, etc. Co., 32 Fed. Rep. 802.

<sup>89</sup> St. Louis, etc. Co. v. Consolidated, etc. Co., 32 Fed. Rep. 802.

<sup>90</sup> Cumberland, etc. Co. v. Turner (1889), 88 Tenn. 265, construing Tenn. Code, §§ 2831-2834, 3536-3539.

<sup>91</sup> Carpenter v. Westinghouse, etc. Co., 32 Fed. Rep. 434, 437.

**§ 1348. Statutes of limitation.** When a foreign corporation can plead.—A foreign corporation is not entitled to plead the statute of limitation in any other State than that of its creation, where for the time necessary for the action to become barred, it did not maintain an agent in such State upon whom service of process might have been made.<sup>92</sup> In the absence of enabling statute, a foreign corporation can not plead the State statute of limitations, where any other non-resident can not plead it.<sup>93</sup> In New York, it can plead the statute only of its own State.<sup>94</sup> In Wisconsin, after it has acquired domicile in the State, for litigation purposes, its statute of limitations runs in behalf of a foreign corporation.<sup>95</sup> In Minnesota, a foreign corporation may plead the statute of limitations,<sup>96</sup> and in Texas,<sup>97</sup> and in Tennessee, where during the whole time it has had an office in the State.<sup>98</sup> The State statute of limitations for action against directors or stockholders of a moneyed corporation, applies to actions brought within the State, against directors or shareholders of a foreign corporation.<sup>99</sup> A statute of limitations, in favor of a resident, can not be pleaded by a foreign corporation doing business within the State.<sup>1</sup>

**§ 1349. Garnishee process.**—A statutory provision for the service of process in suits against foreign corporations, does not apply to the service of writs of garnishment.<sup>2</sup> And where garnishee process against a foreign corporation, to show cause why judgment should not be rendered against it, is served on officers of the corporation, who make affidavit that they are not principal officers, and the corporation appears only specially to move to quash the proceedings on the ground of no service,—no judgment can be rendered against the corporation.<sup>3</sup>

**§ 1350. Suits by foreign corporations.**—A corporation organized in New Jersey under the general law, and not under the gas act, and therefore by its Supreme Court being held powerless

<sup>92</sup> Taylor v. Union Pac. R. Co. (1903), 123 Fed. 155.

<sup>97</sup> Thompson v. Texas, etc. Co. (Tex. 1893), 24 S. W. Rep. 856.

<sup>93</sup> Larson v. Aultman, etc. Co. (1893), 86 Wis. 281, 56 N. W. 915, 39 Am. St. Rep. 893.

<sup>98</sup> Tarcott v. Yazoo, etc. R. R. (1892), 101 Tenn. 102.

<sup>94</sup> Robeson v. Central R. R., 76 Hun, 444 (1894).

<sup>99</sup> Platt v. Wilmot (N. Y. 1904), 193 U. S. 602.

<sup>95</sup> Travelers' Ins. Co. v. Fricke (1898), 99 Wis. 367, 78 N. W. 407, 41 L. R. A. 557.

<sup>1</sup> Williams v. Metropolitan Ry. Co. (Kan. 1903), 64 L. R. A. 794.

<sup>96</sup> St. Paul v. Chicago, etc. Ry. (1891), 45 Minn. 387, 48 N. W. 17.

<sup>2</sup> Milwaukee, etc. Co. v. Brevoort, 73 Mich. 73.

<sup>3</sup> First Nat. Bank v. Burch, 76 Mich. 608.

to engage in the gas business in New Jersey, is equally powerless to engage in the gas business in any other State.<sup>4</sup> A foreign corporation has no right to maintain a suit in any court of the State, without compliance with the statutory requirements to entitle it to do business.<sup>5</sup> A suit for property of a foreign corporation may be maintained in the State by a stockholder, though the corporation is not served with notice and makes no appearance.<sup>6</sup> Though the foreign corporation had not filed its articles as required by statute until four days after defendants made a mortgage to the company to secure payment of certain notes for money received by defendants, the contract was not void, but voidable only, by rescission upon return of the money received.<sup>7</sup> In a suit by a foreign corporation the burden of proof is upon defendant to show that plaintiff as a foreign corporation has not complied with the statute in a way to entitle it to bring suit in the State.<sup>8</sup> A statute provided that no foreign corporation not authorized to do business in the State, could maintain a suit upon any demand, and that the act should not apply to drummers or traveling salesmen for foreign corporations, soliciting business in the State, *Held*, that the corporation was not within the proviso where a resident-agent kept an office rented by the foreign corporation and sold its fruit on the cars shipped into the State and consigned to him for sale, and he remitted the proceeds to the foreign corporation.<sup>9</sup> Under the Fourteenth Amendment of the United States Constitution, a citizen of any other State has the same right as a citizen of New Hampshire to maintain an action in this State against a foreign corporation.<sup>10</sup> The courts of the State of Texas have jurisdiction of a cause of action in favor of a non-resident plaintiff, against a foreign corporation doing business in the State, although the suit is not one *in rem*.<sup>11</sup> A corporation of Pennsylvania can not maintain an action for goods sold, before it obtained its certificate authorizing it to do business in the State of New Jersey, its statutes providing that when another State imposes any greater

<sup>4</sup> Seattle, etc. Co. v. Citizens' etc. Co. (1903), 123 Fed. 588.

<sup>5</sup> Central Mfg. Co. v. Briggs, 106 Ill. App. 417 (1903); Thomas v. Remington, etc. Co. (Kan. 1903), 73 Pac. 909; Allegheny Co. v. Al-len (N. J. 1903), 55 Atl. 724.

<sup>6</sup> Kidd v. New Hampshire T. Co. (N. H. 1903), 56 Atl. 465.

<sup>7</sup> Ames v. Kruzner (1903), 1 Alaska, 598.

<sup>8</sup> D. M. Osborne & Co. v. Shilling (Kan. 1903), 74 Pac. 609.

<sup>9</sup> Fay Fruit Co. v. McKinney, 77 S. W. 321 (Mo. 1903).

<sup>10</sup> Kittel v. New Hampshire, etc. Co. (1903), 56 Atl. 465.

<sup>11</sup> Western U. T. Co. v. Shaw, 77 S. W. 433 (Tex. 1903).

penalties on corporations of New Jersey than its laws imposes, then the same penalties shall be imposed upon corporations of such other State doing business in New Jersey.<sup>12</sup> The New York statute providing that an action for accounting may be brought against the officers of a corporation by a creditor of the corporation or by a trustee, director, manager, or other officer, etc., applies only to domestic corporations.<sup>13</sup> An action will generally lie in favor of a foreign corporation for the purpose of enforcing its contracts.<sup>14</sup> And it will be presumed that a foreign corporation plaintiff has done that which entitles it to do business and to sue in the State, its complaint being silent on the subject.<sup>15</sup> Under a law making invalid the contracts of foreign corporations for failure to comply with certain regulations before doing business in the State, it was held that a demurrer to a suit by a for-

<sup>12</sup> *Wolf v. Lancaster* (N. J. 1903), 56 Atl. 172.

<sup>13</sup> *Miller v. Quincy*, 85 N. Y. S. 310, 88 App. Div. 529.

<sup>14</sup> *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464. The California statute providing that no corporation shall maintain or defend any action in relation to its property until it has filed a copy of the articles of its incorporation with the clerk of the county, does not apply to foreign corporations. *South Yuba, etc. Co. v. Rosa*, 80 Cal. 333 (1889), construing Cal. Civ. Code, § 299.

<sup>15</sup> *Sprague v. Cutler, etc. Co.*, 106 Ind. 242. Accordingly a foreign corporation need not allege in its complaint that it has filed with the secretary of the territory a copy of its articles of incorporation, and appointment of an agent to receive service of process; a demurrer, therefore, to the complaint, because of such omission, cannot be sustained. *American Button-Hole, etc. Co. v. Moore* (1884), 2 Dak. 280. Although the failure to obtain a permit as required by statute may preclude a foreign corporation from transacting further business in the state, it cannot be

made to divest its right to go into court and assert rights and recover property already acquired. *Texas, etc. Co. v. Worsham*, 76 Tex. 556 (1890). And it is no defense to an action by a corporation on the bond of its agent to recover for the agent's default, that at the time of default it was a foreign corporation doing business in the state where action was brought, without having complied with the laws regulating foreign corporations doing business therein. *Singer Mfg. Co. v. Hardee* (N. M. 1888), 16 Pac. Rep. 605. So also an objection that a foreign corporation has no authority to sue on account of non-compliance with the laws relating to such corporations, will not be considered on appeal, where the answer merely states legal conclusions, as that plaintiff had not recorded a "duly-authenticated copy" of the appointment or commission of any agent "duly authorized" to accept service of process, and where there is no evidence in the abstract that the statute relating to foreign corporations has not been complied with. *Gull River Lumber Co. v. Keefe* (Dak. 1889), 41 N. W. Rep. 743.

eign corporation on a note and mortgage for money lent, was bad, it not appearing where the loan was made.<sup>16</sup> Even a provision prohibiting foreign corporations from transacting business within the State unless they have therein a known place of business and an agent capable of being served with process, does not invalidate an individual contract between a foreign corporation and a citizen of the State, nor does it preclude an action by the corporation within the State on a breach of the contract.<sup>17</sup> On the other hand, it has been held that in a suit by a foreign corporation, it must show, not only the papers and proceedings of incorporation, but the statute of the State where it was incorporated, authorizing incorporation.<sup>18</sup>

**§ 1351. Suits by receivers of foreign corporations.**—A foreign corporation whose term of existence in the State of its creation is fifty years, which is permitted to do business in a State which limits the term of corporations for business purposes to twenty years, can not prolong its corporate life there, without compliance with the general law of the State for extension of charters, where restrictions upon corporations apply to foreign and domestic corporations alike.<sup>19</sup> A foreign corporation having the right to institute suits in a State, it follows that its assignee, it having become insolvent, has a similar right.<sup>20</sup> And in a suit by the receiver of a foreign corporation against its officer to reach its assets, defendant can not set up the legal incapacity of the corporation to do business in the State where sued, the State not having complained.<sup>21</sup> In an action on a note in the name of a foreign corporation, where the plaintiff proved the appointment of the receiver, and then introduced in evidence the statute of the foreign State authorizing the appointment on dissolution of a corporation, it was held that the evidence showed that the corporation was dissolved, and was not the real party in interest, and the action was properly dismissed.<sup>22</sup>

**§ 1352. Actions by stockholders of foreign corporations.**—Under a law providing that a resident of the State or a domestic

<sup>16</sup> Finch v. Travellers' Ins. Co.,  
87 Ind. 302, construing Ind. Rev. Stat., §§ 3022-3025.

<sup>17</sup> Cooper Mfg. Co. v. Ferguson,  
113 U. S. 727.

<sup>18</sup> Savage v. Russell (1887), 84 Ala. 103, 4 So. 235.

<sup>19</sup> Iron, etc. Co. v. Cowie (Colo. 1903), 72 Pac. 1067.

<sup>20</sup> Life Assn. of A. v. Levy, 33 La. Ann. 1203 (1882).

<sup>21</sup> Williams v. Hintermeister, 26 Fed. Rep. 889.

<sup>22</sup> Merchants' Loan & Trust Co. v. Clair (1887), 107 N. Y. 663. *Vide supra*, §§ 1239, 1240, FOREIGN RECEIVERS.

corporation may sue a foreign corporation for any cause of action, resident stockholders of a foreign corporation may sue it in the courts of their State to enjoin it and its directors from constructing branch lines of railroad, and from expending funds therefor, which are within the State, to the irreparable injury of the stockholders.<sup>23</sup> And resident stockholders of a foreign corporation may sue another foreign corporation to compel it to perform its agreement to issue certain of its capital stock to the company of which plaintiffs are stockholders, or, in case of its failure to issue the same, then to recover damages.<sup>24</sup> To enable a stockholder, suing as such, to maintain an action against a foreign corporation, it is not necessary that his stock should be registered.<sup>25</sup> But a controversy between *bona fide* stockholders of a corporation on the one side, and those claiming to be stockholders, and the president and directors on the other, can only be determined by the courts of the State by which the corporation was created.<sup>26</sup> And the courts of Maryland will not interfere in controversies relating only to the internal management of the affairs of a foreign corporation. They hold that where the act of a foreign corporation affects one solely in his capacity as a member, it may be said to relate to the management of the internal affairs of the corporation; otherwise where the act affects his individual rights.<sup>27</sup>

**§ 1353. Suits against foreign corporations.**—A foreign corporation may plead its privilege to be sued in the proper county, as in the case of any other defendant, but it waives jurisdictional defenses by its appearance to object to the jurisdiction.<sup>28</sup> Suit may be brought against it, in any county where the corporation has an agent and is doing business in the State.<sup>29</sup> By the constitution of Alabama, suit may be brought against a foreign corporation in any county where it does business.<sup>30</sup> And under a statute providing that when all the defendants are non-residents

<sup>23</sup> Ives v. Smith (1890), 8 N. Y. Supp. 46, affirming 3 N. Y. Supp. 645, construing N. Y. Civ. Code Proc., § 1780.

<sup>24</sup> Babcock v. Schuylkill, etc. R. Co. (1890), 9 N. Y. Supp. 845.

<sup>25</sup> Ervin v. Oregon Railway & Navigation Co. (1882), 62 How. Pr. 490.

<sup>26</sup> Wilkins v. Thorne (1884), 60 Md. 253.

<sup>27</sup> North State, etc. Co. v. Field (1886), 64 Md. 151, 20 Atl. 1039.

<sup>28</sup> Atchison, etc. Co. v. Forbes (Tex. Civ. App. 1904), 79 S. W. 1074.

<sup>29</sup> Hocker v. Western U. T. Co. (Fla. 1903), 34 So. 901; *vide*, SUITS AGAINST FOREIGN CORPORATIONS, 18 L. R. A. 524.

<sup>30</sup> Ala. Const., art. xiv, § 4.

of the State, suit may be brought in any county, a foreign corporation having an office in the State, may be sued in any county thereof.<sup>31</sup> Under the West Virginia Code, a foreign corporation which does business in the State may be sued in any county where process can be legally served, although the cause of action arose out of the State.<sup>32</sup> Under the provision of the Texas act that a company may be sued in any county where it has an agent or representative, it is held that it can be sued only in counties where it has an agent or representative.<sup>33</sup> A statutory provision that a company can not maintain or defend suits relating to its property without first having filed a certified copy of its articles of incorporation in the county where the property is situated, does not apply to an action against it for work and labor.<sup>34</sup> And under a statute requiring a foreign corporation doing business in a territory, to record its charter, it is held that failure to comply therewith simply relieves the party suing it from proving the incorporation except by reputation.<sup>35</sup> But it has been held proper to sue, as partners, persons claiming to be a foreign corporation, when it was shown that not until after the right of action accrued was the statutory requirement of the foreign State complied with as to filing the articles of incorporation.<sup>36</sup> For a tort committed by a foreign corporation within the State of Pennsylvania, the corporation is liable to be sued therein, if found in the State, in the person of an officer or agent upon whom process may be served.<sup>37</sup> So also under an act authorizing suits against foreign corporations by residents of New York for any cause of action, a suit may be brought by a resident executor, upon a policy issued by a Connecticut corporation upon the life of the testator, who lived and died in that State, letters having issued in New York.<sup>38</sup> And

<sup>31</sup> *Estill v. New York, etc. R. Co.* (1890), 41 Fed. Rep. 849, construing Mo. Rev. Stat., § 3481, subd. 4. The terms "any private corporation" and "any incorporated company," in the Texas statutes relating to suits against corporations, are broad enough to include foreign corporations. *Augerhoefer v. Bradstreet Co.*, 22 Fed. Rep. 353 (1885), construing Tex. Rev. Stat., art. 1223.

<sup>32</sup> *Humphreys v. Newport News, etc. Co.* (1889), 33 W. Va. 135, 10 S. E. 39, construing W. Va. Code, ch. 123, § 1.

<sup>33</sup> *St. Louis, etc. R. Co. v. Whitley* (1890), 77 Tex. 126, 13 S. W. 853.

<sup>34</sup> *Weeks v. Garibaldi, etc. Co.* (1887), 73 Cal. 599.

<sup>35</sup> *King v. National M. & E. Co.* (1884), 4 Mont. 1, 1 Pac. 127, construing Mont. Cod. Stat. 1872, p. 419, § 46.

<sup>36</sup> *Smith v. Warden*, 86 Mo. 382.

<sup>37</sup> *Gray v. Taper Sleeve Pulley Works* (1883), 15 Fed. Rep. 436.

<sup>38</sup> *Palmer v. Phœnix Mut. Life Ins. Co.*, 84 N. Y. 63, construing N. Y. Code Civ. Proc., § 427.

again, a resident of New York may maintain an action against a foreign corporation, although the acts out of which the cause of action arises, and the property from the management and disposition of which plaintiff's loss and damage were sustained, are beyond the jurisdiction, and the relief which it is in the power of the court to grant, may be incomplete.<sup>39</sup> But it is held that a railroad corporation controlling a line in several States, but not in Iowa, can not be sued there by a citizen of Iowa, on a cause of action not arising there.<sup>40</sup> In a suit against a foreign corporation it is not necessary that the existence of any of the statutory facts giving jurisdiction should be alleged to give the court jurisdiction, and the petition is not demurrable for the failure.<sup>41</sup> So also, where, in an action on a policy issued by a foreign insurance company, the declaration, the application, and the policy showed that defendant was doing business in the State; and it pleaded nothing to the contrary, and did nothing to oust the jurisdiction of the court, it was considered that the objection that there was no allegation or proof that the company was doing business in the State, was not well taken.<sup>42</sup> A contract of fire insurance made in Iowa, the statutes of which State provide in what counties an action may be brought on the policy, does not limit the right to bring an action for loss of the property to that State, for the action is transitory in its nature, and may be brought wherever service may be had on the company.<sup>43</sup> It seems that a company established in two States may be sued in either, as a non-resident.<sup>44</sup>

**§ 1354. Suits by non-residents against foreign corporations.** A foreign corporation can be sued by a non-resident, only in one of the cases specified in the statutes giving the jurisdiction.<sup>45</sup> And the right of the non-resident to sue a foreign corporation, depends on the plaintiff's residence, not on his citizenship.<sup>46</sup> Therefore a statute restricting this power to cases where the cause of action

<sup>39</sup> Ervin v. Oregon Railway & Navigation Co., 62 How. Pr. 490.

<sup>44</sup> Newport & C. Bridge Co. v. Wooley, 78 Ky. 523.

<sup>40</sup> Elgin Canning Co. v. Atchison, etc. R. Co., 24 Fed. Rep. 866.

<sup>45</sup> Ervin v. Oregon Ry. & Navigation Co. (1883), 28 Hun, 269; Central R., etc. Co. v. Georgia, etc. Co. (1889), 32 S. C. 319; N. Y. Code Civ. Proc., § 1780; S. C. Code, § 423.

<sup>41</sup> Friezen v. Allemania Fire Ins. Co., 30 Fed. Rep. 349.

<sup>46</sup> Adams v. Penn Bank (1885), 35 Hun, 393.

<sup>42</sup> Hull v. Alabama, etc. Co., 79 Ga. 93 (1887).

<sup>43</sup> Insurance Co. of N. A. v. McLimans (Neb. 1890), 44 N. W. Rep. 991.

arises in the State, is not unconstitutional as violating the privileges and immunities of citizens in the several States.<sup>47</sup> Neither is it unconstitutional as impairing the obligation of contracts, as a corporation, being the mere creation of the local law, depends for recognition of its legal existence by other States, on the assent of the States, and a State may make such regulations in regard to corporations created in another State as it deems best, or may exclude them altogether. Neither is it in conflict with a constitution of a State which provides that "all courts shall be public, and every person, for any injury that he may receive in his lands, goods, person or reputation, shall have remedy by due course of law," as the object of that section of the constitution was not to open the courts of the State to all persons, to demand redress for injuries received anywhere, but simply to secure to the inhabitants of the State access to the courts for the redress of injuries which they may have received.<sup>48</sup> Under statutes which either simply give non-residents the right to sue foreign corporations if the cause of action arises within the State, or for enumerated causes all of which arise within the State, a suit between such parties, upon causes of action not arising within the State, can not be maintained.<sup>49</sup> And where plaintiff, a national

<sup>47</sup> Central R., etc. Co. v. Georgia, etc. Co. (1889), 32 S. C. 319, 11 S. E. 192.

<sup>48</sup> Central R., etc. Co. v. Georgia, etc. Co. (1889), 32 S. C. 319, 11 S. E. 192.

<sup>49</sup> Robinson v. Oceanic, etc. Co. (1889), 112 N. Y. 315; Central R., etc. Co. v. Georgia, etc. Co. (1889), 32 S. C. 319, 11 S. E. 192. Cf. S. C. Code, § 423; N. Y. Code Civ. Proc., § 1780. But where a motion is made under these statutes to dismiss an action based on the complaint and affidavits in the case, on the ground that the court has no jurisdiction because the action is by a non-resident against a foreign corporation on a cause of action which did not arise in this state, and the complaint alleges that plaintiff entered into a contract with defendant to do work on a railroad running from a certain place in this state to a place in another state, and the com-

plaint contains a bill of particulars showing that a considerable amount of work was done in this state, and it also appears from the affidavits that a part of plaintiff's claim is evidenced by notes executed in this state, the motion will be denied. Central R., etc. Co. v. Georgia, etc. Co. (1889), 32 S. C. 319. Although property seized under attachment proceedings does not constitute "the subject of the action," so as to give the court jurisdiction of an action by a non-resident against a foreign corporation, when there is no allegation in the complaint filed in the action of any title to, or any interest in, the property levied on; as an attachment is only a provisional remedy, which requires an action legally instituted as a necessary condition precedent to the right to maintain it, and the real subject of the action must necessarily be the

bank, organized and doing business in Louisiana, purchased of another bank, also a Louisiana corporation, a draft on bankers in New York, drawn to plaintiff's order, and payment was refused, and a suit begun in New York, and funds of the second bank attached therein,—it was held that under the section of the Code providing that an action may be begun in New York against a foreign corporation by a plaintiff not a resident of the State "when the cause of action shall have arisen in this State,"—the court had jurisdiction.<sup>50</sup>

**§ 1355. Suits by foreign corporations against foreign corporations.**—Foreign corporations may sue one another if both are doing business within the State, and the cause of action accrued there.<sup>51</sup> Accordingly, where an unlawful transfer of stock is made in New York by the transfer agency of a foreign corporation, the wrongful act is committed there, and therefore the State courts have jurisdiction, although the party injured is also a foreign corporation.<sup>52</sup> And a foreign corporation may institute proceedings in New York for an injunction against the prosecution of an arbitration begun under an agreement with another foreign corporation.<sup>53</sup> So also, when there is a statutory provision for acquiring jurisdiction, a corporation of another State can sue an alien corporation in the federal courts.<sup>54</sup> But the legislature may restrict the right of one foreign corporation to sue another.<sup>55</sup> And a foreign construction company can not maintain a bill in equity in Massachusetts against a foreign railroad corporation and a citizen of Massachusetts, to enforce specific performance of a covenant in a contract for the delivery of bonds and certificates of stock in payment of work to be performed by the construction company in a foreign State, and to restrain, by injunction, the citizen of Massachusetts from disposing thereof of shares of stock and bonds of the railroad company, alleged to have been delivered to him in violation of the plaintiff's rights, al-

subject of the complaint. *Central R., etc. Co. v. Georgia, etc. Co.* (1889), 32 S. C. 319.

<sup>50</sup> *Hibernia Bank v. Lacombe*, 84 N. Y. 367, 38 Am. Rep. 518.

<sup>51</sup> *Emerson v. McCormick, etc. Co.* (1884), 51 Mich. 5, 16 N. W. 182.

<sup>52</sup> *Toronto G. T. Co. v. Chicago, etc. R. Co.*, 32 Hun, 190. Cf. N. Y. Code Civ. Proc., § 1780, subd. 3.

<sup>53</sup> *Direct U. S. Cable Co. v. Dominion T. Co.*, 84 N. Y. 153, reversing 22 Hun, 568.

<sup>54</sup> *Merchants' Mfg. Co. v. Grand Trunk Ry. Co.* (1882), 63 How. Pr. 459.

<sup>55</sup> *Duquesne Club v. Penn Bank* (1885), 35 Hun, 390. Cf. N. Y. Code Civ. Proc., § 1780.

though the railroad corporation has an office in Massachusetts for the transfer of stock, and has appeared by attorney in the suit.<sup>56</sup>

**§ 1356. Production of books and records, when required of foreign corporation.**—The provision of the New York code in respect to the production of its corporate records in suits to which the corporation is a party, is held to apply to foreign corporations keeping their books within that State;<sup>57</sup> although, if the books are out of the State, officers in the State can not be required, under this provision, to produce them.<sup>58</sup> In any case an order for inspection before a referee, of books of a corporation in a distant State, should merely direct a delivery of sworn copies within a reasonable time.<sup>59</sup> The New Jersey statute giving the courts of that State authority to require a foreign corporation to bring its books into the State, does not give the courts authority to require a foreign corporation to bring in all its papers and memoranda.<sup>60</sup>

**§ 1357. Evidence of corporate existence of foreign companies.**—A copy of an act to incorporate a foreign corporation, to which is appended the certificate of the Secretary of the State of the corporation's origin, with the seal of the State affixed, is admissible to show the existence of the corporation.<sup>61</sup> And proof that a company attempted an organization under the general statute of another State, and transacted business as a corporation *de facto*, the certificates of its shares of stock reciting that it was organized under the general laws of that State,—is sufficient, in the absence of anything to the contrary, to authorize a finding that the company was duly incorporated, in a case in which the fact is only collaterally in issue.<sup>62</sup> So also the records, books and minutes embracing the proceedings in the organization of a

<sup>56</sup> Kansas R., etc. Co. v. Topeka, etc. R. Co. (1884), 135 Mass. 34, 46 Am. Rep. 439.

<sup>57</sup> *In re Sykes*, 10 Ben. 162, construing N. Y. Code Civ. Proc., § 868.

<sup>58</sup> *United States v. Tilden*, 18 Alb. L. J. 416.

<sup>59</sup> *Ervin v. Oregon Ry., & Nav. Co.*, 22 Hun, 566; *Bas v. Steele*, 3 Wash. 381; *Bank of U. S. v. Wilson*, 3 Cr. C. C. 213; *Tuttle v. Mechanics' Bank*, 6 Whart. 216; *Humphrey v. Coleman*, 1 Blackf.

199; *Rose v. King*, 5 S. & R. 241; *Arrott v. Pratt*, 2 Whart. 566; *Gilpin v. Howell*, 5 Pa. St. 41; *Willis v. Bayley*, 19 Johns. 268.

<sup>60</sup> *Huylar v. Cragin Cattle Co.* (1887), 42 N. J. Eq. 139; *Vide supra*, §§ 117, 1010, PRODUCTION OF BOOKS AND RECORDS AS EVIDENCE IN SUITS.

<sup>61</sup> *Pacific Guano Co. v. Mullen*, 66 Ala. 582.

<sup>62</sup> *Barrett v. Meade*, 10 Allen, 337.

company under and in pursuance of its charter, when regular and identified by the person authorized to make them, are *prima facie* evidence of its organization and corporate existence.<sup>63</sup>

**§ 1358. Actions in federal courts.**—By act of Congress of 1887, jurisdiction of the federal courts, when invoked by parties on the ground of being citizens of different States, was limited to cases where either the plaintiff or defendant resides in the judicial district. When neither plaintiff or defendant resides in the district where suit is brought, objection is waived by appearance.<sup>64</sup> In the absence of a voluntary appearance, three things are requisite to give the federal courts jurisdiction *in personam* over a corporation created without the territorial limits of the State in which the court is held. First, it must appear as a matter of fact that the corporation is carrying on its business in the foreign State or district. Second, that the business is transacted or managed by some agent or officer appointed by and representing the corporation in the State. Third, some local law making that corporation, or foreign corporations generally, amenable to suit there.<sup>65</sup> A corporation can not acquire a residence in a State other than the one in which it is incorporated within the meaning of the act which provides that suit in the federal courts shall be brought in the district of the residence of either the plaintiff or defendant.<sup>66</sup> Accordingly a corporation can not be sued in a State other than the one of its incorporation because of its maintaining an office and having an agent there.<sup>67</sup> But where corporations in consideration of the grant of the privilege of doing business in a State have agreed that they may be sued there, they may be so sued in the federal as well as State courts.<sup>68</sup>

**§ 1359. Jurisdiction of federal courts. Rule 94 as to transferees.**—If the complaining stockholder is a non-resident and resides in another State, he may there bring suit in the federal court.<sup>69</sup> If both the parties in interest are corporations of the

<sup>63</sup> *Glenn v. Orr* (1887), 96 N. C. 413, 2 S. E. 538.

<sup>64</sup> *Interior Constr., etc. Co. v. Gibney* (1895), 160 U. S. 217; *Central, etc. Co. v. McGeorge* (1894), 151 U. S. 129; *Citizens, etc. Co. v. Union, etc. Co.* (1900), 106 Fed. 97; *Vide*, 24 L. R. A. 289.

<sup>65</sup> *Case of Telephone Co.*, 29 Fed. Rep. 17; *Carpenter v. Westinghouse Air-Brake Co.*, 32 Fed. Rep. 434.

<sup>66</sup> *Booth v. St. Louis, etc. Co.*, 40 Fed. Rep. 1.

<sup>67</sup> *Bensinger, etc. Co. v. National, etc. Co.*, 42 Fed. Rep. 81, 8 Ry. & Corp. L. J. 62.

<sup>68</sup> *Ex parte Schollenberger*, 96 U. S. 377; *Lafayette Ins. Co. v. French*, 18 How. 404.

<sup>69</sup> *Barnes v. Kornegay*, 62 Fed. 671 (1894).

same State, a citizen of another State can not, by reason of such residence, bring suit in the federal court.<sup>70</sup> Of a stockholder's suit for receiver, the federal court has no jurisdiction, unless the stock he owns is of value exceeding \$2,000, and was owned by him when the acts complained of occurred, and he must have made unavailable efforts to have the corporation itself take action for relief.<sup>71</sup>

*Rule ninety-four of the Federal Court, limiting suits by transferees.*—Owing to the frequent transfer of stock for the purpose of obtaining jurisdiction of the federal courts, of suits that properly belonged in the courts of the States,<sup>72</sup> the United States Supreme Court, in 1882, made as a rule for the federal courts, that a transferee of stock can not bring a stockholder's suit for relief against any act committed before the transfer. "Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may be properly asserted by the corporation, must be verified by oath, must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since, by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance."<sup>73</sup> The rule does not apply to causes removed from a State court. The transferee is not allowed to attack the acts and management of the company prior to the acquisition of his stock.<sup>74</sup> The rule is adopted in Georgia, and in Nebraska.<sup>75</sup> If that were the rule of all courts, the purchaser of shares, in however good faith, after the doing of an *ultra vires* act, would be without remedy in any court.<sup>76</sup> The State is not a citizen, where suit by a State is brought in a State court against a corporation. The defendant can not remove the case into the federal court on the ground of difference of citizenship of the parties.<sup>77</sup> A suit for damages for tort committed by a foreign corporation and removed into a federal court, will not be dismissed because the tort

<sup>70</sup> Quincy v. Steel (1887), 120 U. S. 241.

Louisiana, etc. Co. (1895), 58 Fed. 673.

<sup>71</sup> Robinson v. West Virginia L. Co. (1898), 90 Fed. 770.

<sup>75</sup> Alexander v. Searcy, 81 Ga. 536 (1888), 8 S. E. 630, 12 Am. St. Rep. 337.

<sup>72</sup> See Hawes v. Oakland (1881), 104 U. S. 450.

<sup>76</sup> Forrester v. Boston, etc. Co. (1898), 21 Mont. 544, 55 Pac. 229.

<sup>73</sup> Evans v. Union Pac. Ry., 58 Fed. 497 (1893).

<sup>77</sup> Postal, etc. Co. v. Alabama (1894), 155 U. S. 482.

<sup>74</sup> United Electric, etc. Co. v.

was committed outside of the district.<sup>78</sup> The trustee in a mortgage suit, is a mere formal party. The federal court is not ousted of its jurisdiction in a suit by a corporation to cancel bonds illegally issued and secured by mortgage, because the defendant trustee of the mortgage resides in the same State as the plaintiff corporation.<sup>79</sup> The corporation is considered a mere nominal party in determining whether a suit is removable to the federal court, which suit stockholders have brought to test the title to stock, and have made the corporation a party defendant.<sup>80</sup> The federal court has jurisdiction of a suit for injunction, regardless of citizenship, where a city in violation of its contract, authorized under State statute and made with a waterworks company, undertakes to build its own waterworks,<sup>81</sup> and the court is not ousted of its jurisdiction in a pending suit in such a case, to test validity of reduction of water-rates by reason of expiration of the contract pending the litigation.<sup>82</sup> Where a citizen of another State purchases waterworks at sale in foreclosure of mortgage, he can maintain suit in the federal court to collect debt due the waterworks company from the city under its contract for water supply, though the city and the company being citizens of the same State, the company could not have brought its suit in the federal court.<sup>83</sup> Where the interests of a waterworks company and of the trustee of its mortgage are the same, he can not maintain suit in the federal court against the waterworks company and the city wherein the waterworks are located, the company and the city being citizens of the same State.<sup>84</sup> The federal court has no jurisdiction of a suit by the trustee of a mortgage, to enjoin condemnation by a corporation of the mortgaged property, where the mortgagor is a necessary party, and the corporation are citizens of the same State.<sup>85</sup> A non-resident stockholder may maintain suit in the federal court of the district where the corporation was created, to set aside an illegal forfeiture of his stock, and may make non-resident defendants parties to the suit.<sup>86</sup> A suit against a foreign corporation not doing business in the

<sup>78</sup> Denver, etc. R. R. v. Roller (1900), 100 Fed. Rep. 738.

<sup>79</sup> Lake, etc. R. R. v. Ziegler, 99 Fed. 114 (1900).

<sup>80</sup> Higgins v. Baltimore, etc. R. R. (1900), 99 Fed. 640.

<sup>81</sup> Walla Walla City v. Walla Walla W. Co. (1898), 172 U. S. 1.

<sup>82</sup> Kimball v. City of Cedar Rapids (1900), 100 Fed. 802.

<sup>83</sup> Portage City, etc. Co. v. City of Portage (1900), 102 Fed. 769.

<sup>84</sup> Boston, etc. Co. v. City of Racine (1899), 97 Fed. 817.

<sup>85</sup> Old Colony, etc. Co. v. Atlanta Ry. (1899), 100 Fed. 798.

<sup>86</sup> Jellenik v. Huron, etc. Co. (1899), 177 U. S. 1.

State, can not be brought in the federal court by service upon its president, while casually in the State.<sup>87</sup> If a foreign corporation is sued in a State court by service upon the president or a director temporarily in the State, the corporation may remove to the federal court, and have the suit dismissed.<sup>88</sup> The manager of a foreign corporation sued in a State court, may be served with process, although temporarily there, if on business connected with the suit.<sup>89</sup> Against an alien corporation, a non-resident may bring suit in the federal court, though the State court by statute would have no jurisdiction.<sup>90</sup> Jurisdiction of the federal court over a foreign corporation, is not affected by requirement of the State that it shall file its charter with the secretary of the State as a condition to doing business in the State.<sup>91</sup> The federal court will refuse to exercise its jurisdiction of a suit concerning property transferred to a non-resident corporation for the purpose of giving the court jurisdiction.<sup>92</sup> "The members of a corporate body must be conclusively presumed to be citizens of the State in which the corporation is domiciled."<sup>93</sup> Its stockholders and the corporation are citizens of the State wherein it is incorporated, for all purposes of the jurisdiction of a federal court.<sup>94</sup> It is insufficient to allege in a suit in the federal court, that the corporation is a citizen of a certain State. It must be alleged that the incorporation was under the laws of that State.<sup>95</sup> A railroad running through several federal districts, is a resident of that district wherein are established its general offices and headquarters.<sup>96</sup> A railroad is a citizen of each State into which it runs, and being sued in either, can not remove the suit to the federal court in the other, on the ground of non-residence.<sup>97</sup> A corporation of

<sup>87</sup> *Golden v. Morning News*, 156 U. S. 518 (1895).

<sup>88</sup> *Bentif v. London, etc. Corp.* (1890), 44 Fed. 667; *Reifsneider v. American, etc. Co.* (1891), 45 Fed. 433; *Fitzgerald, etc. Co. v. Fitzgerald* (1890), 137 U. S. 98.

<sup>89</sup> *Houston v. Filer, etc. Co.*, 85 Fed. 757 (1898).

<sup>90</sup> *Barrow, etc. Co. v. Kane*, 170 U. S. 100 (1898).

<sup>91</sup> *St. Louis, etc. Ry. Co. v. James* (1896), 161 U. S. 545; *Stephens v. St. Louis, etc. R. R.*, 47 Fed. 530 (1891); *Martin v. Baltimore, etc. R. R.* (1894), 151 U. S. 673.

<sup>92</sup> *Lehigh, etc. Co. v. Kelly*, 160 U. S. 327 (1895).

<sup>93</sup> *Shaw v. Quincy Min. Co.*, 145 U. S. 444 (1892).

<sup>94</sup> *St. Louis, etc. Ry. Co. v. James* (1896), 161 U. S. 545; *Miller v. Wheeler, etc. Co.* (1891), 46 Fed. 882; *Overman, etc. Co. v. Pope Mfg. Co.* (1891), 46 Fed. 577.

<sup>95</sup> *Dalton v. Milwaukee* (1902), 118 Fed. 876.

<sup>96</sup> *Galveston, etc. Ry. v. Gonzles* (1894), 151 U. S. 496.

<sup>97</sup> *Winn v. Wabash R. R.*, 118 Fed. 55 (1892).

one State can not be sued in the federal court in another State, by a citizen of a third State.<sup>98</sup> An Illinois railroad corporation, which first leased and afterward purchased a railroad incorporated in Iowa, did not thereby become an Iowa corporation, but continued to be an Illinois corporation.<sup>99</sup> A company, incorporated under act of Congress, may sue in or remove a suit into any federal court.<sup>1</sup> In a stockholder's suit in New Jersey, to set aside a sale of all assets of a Maine corporation to a New Jersey corporation, the former is a necessary party defendant, and a court in Maine will not appoint a receiver of the corporation there, merely to appear in the suit in New Jersey.<sup>2</sup> It has been decided that a New York corporation, having its principal office in that State, and doing business in Illinois, can not be sued in the federal courts in Illinois.<sup>3</sup> And a citizen of Mexico can not sue a Connecticut corporation in the United States circuit court for the southern district of California, although the corporation has an office and managing agent in that district.<sup>4</sup> The presence of the chief officers of a corporation in a State other than that of its creation, does not change the residence of the corporation, nor does the fact that the officers carry into the State property of the corporation, for the purpose of exhibition and advertisement, bring the corporation into the State as an "inhabitant," or so that it can be said to be "found" there, within the meaning of the act of congress.<sup>5</sup> Where, however, a plaintiff is a citizen of Massachusetts, and defendant a corporation created by the law of Rhode

<sup>98</sup> *Shaw v. Quincy Min. Co.*, 145 U. S. 444 (1892).

<sup>99</sup> *Connecticut v. Chicago, etc. R. R.* (1891), 48 Fed. 177.

<sup>1</sup> *Pacific R. R. Removal Cases*, 115 U. S. 2 (1885).

<sup>2</sup> *Hutchinson v. American, etc. Co.* (1900), 104 Fed. 182.

<sup>3</sup> *Preston v. Fire-Extinguisher Mfg. Co.*, 36 Fed. Rep. 721.

<sup>4</sup> *Denton v. International Co.*, 36 Fed. Rep. 1.

<sup>5</sup> Thus the operation of a train of its cars by a foreign corporation in Iowa, for the purpose of exhibition and advertisement, when neither passengers nor freight are transported, does not come within the law authorizing suits to be brought against rail-

way companies and the owners of lines, or persons operating the same, in any county through which the line or road passes or is operated; nor does it come within that which provides that when a corporation, company, or individual has an office or agency in any county for the transaction of business, any suits growing out of or connected with the business of that office or agency may be brought in the county where the agency is located; and this is so, although the wrong complained of was the alleged infringement of a patent by such operation of a train of cars. *Carpenter v. Westinghouse, etc. Co.*, 32 Fed. Rep. 434.

Island as well as by the law of Massachusetts, the suit may be brought in the federal court for the Rhode Island district. For the purposes of the suit, defendant is to be deemed a citizen of Rhode Island.<sup>6</sup> And the fact that a foreign corporation is in liquidation, and has been placed by the courts of that country in the hands of a liquidator, will not prevent a person from establishing his claim against the corporation by suit in a federal court, and subjecting its property to the satisfaction thereof.<sup>7</sup>

**§ 1360. Removal of causes from State to federal courts.**—A suit may not be removed to the federal court by a defendant corporation, where the complainants and necessary parties defendant who joined in committing the acts complained of, all reside in the same State.<sup>8</sup> When the controversy is inseparable, and both corporations are party defendants, a suit by a stockholder to enjoin a foreign corporation from control of his domestic corporation can not be removed by the foreign corporation to the federal court.<sup>9</sup> The court has no jurisdiction in the absence of averment that complainant's holding of stock are worth more than \$2,000.<sup>10</sup> One who purchases property at foreclosure sale ordered by a federal court may enjoin suit in a State court for appointment of a receiver of the property in disregard of the federal decree of foreclosure and sale.<sup>11</sup> The federal court which made the decree may set aside the foreclosure as fraudulent, regardless of citizenship.<sup>12</sup> It has no jurisdiction of a suit brought in that court in Massachusetts for a receiver by a Connecticut stockholder in a Maine corporation, although the Maine corporation has an appointed agent in Massachusetts to accept service.<sup>13</sup> That court has no jurisdiction of a suit brought by a Pennsylvania stockholder in a New Jersey corporation to enjoin it and its non-resident directors from illegally issuing stock.<sup>14</sup> It has no jurisdiction of a suit brought in that court in Missouri, by a stockholder residing in Missouri, to set aside a fraudulent consolidation of Kansas railroad companies.<sup>15</sup> A stockholder's suit cannot be re-

<sup>6</sup> *Page v. Fall River, etc. R. Co.* (1887), 31 Fed. Rep. 257.

<sup>11</sup> *James v. Central, etc. Co.* (1899), 98 Fed. 489.

<sup>7</sup> *Societe Fonciere et Agricole v. Milliken* (1890), 135 U. S. 304.

<sup>12</sup> *Pacific R. R. Co. v. Missouri Pac. R. R.* (1884), 111 U. S. 505.

<sup>8</sup> *Wilder v. Virginia, etc. Co.* (1891), 46 Fed. 676.

<sup>13</sup> *Platt v. Mass. etc. Co.* (1900), 103 Fed. 705.

<sup>9</sup> *MacGinness v. Boston, etc. Co.* (1902), 119 Fed. 96.

<sup>14</sup> *Lengel v. American, etc. Co.* (1901), 110 Fed. 19.

<sup>10</sup> *Harvey v. Raleigh, etc. R. R.* (1898), 89 Fed. 115.

<sup>15</sup> *Stevens v. Missouri, etc. Ry.* (1901), 106 Fed. 771.

movable to a federal court on account of local prejudice, where the controversy is inseparable and one of the defendants and the larger number of the complaining stockholders are citizens of the same State.<sup>16</sup> Where a minority of the stockholders bring suit against the corporation, and the majority hold them liable, they may remove to the federal court, although the complainants of the corporation are citizens of the same State.<sup>17</sup> Where a suit is against two directors for damages, and no conspiracy being charged, one of them may remove the suit to the federal court.<sup>18</sup> Where a resident stockholder of a foreign corporation brings suit against it for a receiver, and joins the local manager as merely nominal defendant, the corporation may remove the case to the federal court.<sup>19</sup> Where a stockholder's suit against a foreign corporation and its directors is to enjoin a stockholders' meeting, and for an accounting by the directors and for a receiver, the defendant corporation cannot remove the case to the federal court.<sup>20</sup> A non-resident stockholder may bring suit in a federal court, especially where the suit is upon alleged violation of the federal constitution.<sup>21</sup> A stockholder's suit in equity against the corporation and a majority owner of the stock, to enjoin wrongful disposition of the corporate property, can not be removed to the federal court by the defendant owner of a majority of the stock, on the ground of separable controversy, the corporation and the complainant being citizens of the same State.<sup>22</sup> A suit cannot be brought in the federal court in Washington by a resident stockholder owning shares in an Oregon corporation, to hold non-resident directors liable for paying illegal salaries, and for a receiver's appointment to collect the corporate debts.<sup>23</sup> The filing by a foreign corporation of its articles of incorporation with the Secretary of State of a foreign State, as required by an act thereof, does not alter its *status* as a foreign corporation. Accordingly, in an action brought against it by a corporation of that State, the defendant may have the cause removed from a State court to a

<sup>16</sup> Gann v. Northeastern R. R. (1891), 57 Fed. 417.

<sup>20</sup> Campbell v. Miliken (1902), 119 Fed. 981.

<sup>17</sup> Lamm v. Parrot, etc. Co. (1901), 111 Fed. 241.

<sup>21</sup> Simpson v. Union Stock, etc. Co. (1901), 110 Fed. 799.

<sup>18</sup> Youtsey v. Hoffman (1901), 108 Fed. 693.

<sup>22</sup> Hanover National Bank v. Credits, etc. Co. (1902), 118 Fed. 110.

<sup>19</sup> Sidway v. Missouri, etc. Co. (1902), 116 Fed. 381.

<sup>23</sup> Leary v. Columbia, etc. Co. (1897), 82 Fed. Rep. 775.

United States circuit court.<sup>24</sup> And a statutory restriction, to prevent foreign corporations from transacting business in the State without permit, is rendered void by a provision that, as a condition precedent to the issue of such permit, they shall surrender their right to remove certain suits into the federal courts, it appearing to be the entire purpose of the statute to deprive those companies of that right.<sup>25</sup> Where a consolidation of a foreign with a domestic railroad, has not taken place till after suit brought against the foreign corporation by a domestic corporation, and the filing of a petition for removal, the consolidation does not alter the foreign corporation's right to a removal of the cause.<sup>26</sup> An action for trespass against two corporations jointly, brought in a State court, can not be removed to a federal court by one of the defendants upon the ground of a separable controversy between itself and plaintiff, though defendants plead severally,—on the mere allegation that the other defendant was not in existence at the time of the alleged trespass, as this affects the merits, and not the jurisdiction.<sup>27</sup> Where,—in an action by a

<sup>24</sup> Chicago, etc. R. Co. v. Minnesota, etc. R. Co., 29 Fed. Rep. 337.

<sup>25</sup> Barron v. Burnside, 121 U. S. 186; Texas, etc. Co. v. Worsham (1890), 76 Tex. 556, 13 S. W. 384. And where a foreign corporation commenced a suit of foreclosure in the circuit court of the United States, but discontinued that suit, and commenced an action in the state court for the same purpose, the commencement of the suit in the federal court, although prohibited by the terms of the statute, forbidding foreign corporations doing business in the state from commencing suits in or removing them to federal courts, did not affect the right of the corporation to maintain the action in the state court. Northwestern Mut. Life Ins. Co. v. Stone (Minn. 1886), 31 N. W. Rep. 54.

<sup>26</sup> Chicago, etc. R. Co. v. Minnesota, etc. R. Co., 39 Fed. Rep. 337.

<sup>27</sup> Louisville, etc. R. Co. v. Wangelin (1890), 132 U. S. 599, following Railroad Co. v. Grayson, 119 U. S. 240, 244, which was a suit in equity against two corpo-

rations, where the question being whether there was a separable controversy between one of them and the plaintiff which would warrant a removal into the circuit court of the United States, it was said by Chief Justice Waite, and adjudged by this court, that the allegations of the bill must, for the purposes of that inquiry, be taken as confessed. In the case at bar the declaration charged two corporations with having jointly trespassed on the plaintiff's land. Whether they had done so or not was a question to be decided at the trial; and it is not contended, and could not be, in the face of the decisions already cited, that the record of the state court, as it stood at the time of the filing of the petition for removal, showed a separable controversy between the plaintiff and either defendant. The argument in support of the jurisdiction of the federal court is that the Louisville & Nashville Railroad Company was the only real defendant, because, at the time of

State in its own courts to recover certain penalties imposed on foreign insurance companies for doing business without complying with the State laws,—the right of recovery depends on the question of mixed law and fact, (whether service of summons has been made on a person who was at the time an agent of the company within the State on whom process might legally be served, so as to bind the company and bring it within the jurisdiction of the court,) there is no question dependent on a construction of the constitution or any law of the United States, and therefore no cause for removal, since until the question of jurisdiction is decided there is no "suit brought," within the terms of the act of Congress authorizing such removals.<sup>28</sup>

the trespass complained of, the other defendant was not in existence. But this was a matter affecting the merits of the case, and one which the plaintiff was entitled to deny and disprove at the trial upon the issues joined by the pleadings. Both the defendants were sued and served as corporations, and pleaded as such, in the state court; and it is not denied that each of them was a corporation when the action was brought. The question whether one of them was in existence as a corporation

at the time of the alleged trespass did not affect the question whether it could be now sued, but the question of its liability in the action; in other words, not the jurisdiction, but the merits, to be determined when the case came to trial. It could not be tried and determined in advance, as incidental to a petition by a co-defendant to remove the case into the circuit court of the United States.

<sup>28</sup> Germania Ins. Co. v. State of Wisconsin (1886), 119 U. S. 473.

## CHAPTER LVII.

### UNINCORPORATED ASSOCIATIONS.

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§ 1361. Unincorporated associations, distinguished from corporations.—Of unincorporated associations, the Supreme Court of Pennsylvania said: "They have some elements in common with corporations, joint-stock companies, and partnerships, such as association and being governed by regulations adopted by themselves, does for that purpose, . . . I have very little doubt, therefore, that the same rules of law and equity, so far as regards the control of them and the adjudication of their reserved and inherent powers to regulate the conduct and to expel their members, apply to them as to corporations and joint-stock companies."<sup>1</sup> A test, in any given case, whether or not an association is a corporation, is whether the members are merged into a distinct artificial existence. If they are so merged, the association is a corporation.<sup>2</sup> "It is of no consequence that, in the

<sup>1</sup> Gorman v. Russell, 14 Cal. 532; Babb v. Reed, 5 Rawle's Rep. 151, 28 Am. Dec. 650; Otto v. Union, 75 Cal. 308; People v. Board of Trade, 80 Ill. 137; Anacosta Tribe v. Murbach, 13 Md. 91, 71 Am. Dec. 625.

<sup>2</sup> Warner v. Beers, 23 Wend. (N. Y.) 103; Thomas v. Dakin, 22 Wend. (N. Y.) 9.

statute under which these companies are sometimes organized, they are called unincorporated associations. In determining what such institutions really are, regard is to be had to their essential attributes rather than to any mere name by which they may be known. If the essential franchises of a corporation are conferred by the statute upon a joint-stock company, it is none the less a corporation for being called something else.<sup>3</sup> Unincorporated associations are often called voluntary associations, but improperly so, for all private corporations, as well as partnerships and societies, are voluntary associations. Unincorporated associations include clubs, partnerships, car trusts, mining associations, societies, joint-stock, mutual insurance companies, and others, and though all of them are voluntary, they are not all of them strictly partnerships, nor are the members of all those associations subject to liability as partners.

*How governed. Majority does not rule.*—With reference to making rules for the government of their own members, greater power is sometimes recognized as belonging to unincorporated associations than to corporations, for the former are under no restrictions, so long as they do not conflict with general laws.\* The rule as to by-laws, that to be valid they must be reasonable, does not apply to the by-laws of unincorporated associations.<sup>5</sup> So long as they are not illegal, or contrary to public policy, the courts never interfere to control their enforcement.<sup>6</sup> An insolvent association which depends for its profits upon the failure of many of its members to pay their subscriptions, and thereupon to forfeit their memberships and all subscriptions paid, is not illegal.<sup>7</sup> These associations are not bound by majority rule, which is the governing principle of a corporation. If it is non-stock, the majority of the members govern, only where they so agree, but if stock is issued, its majority holders control. In an early case which was a suit by three persons on behalf of all the other members of a lodge of Free Masons, Lord Eldon observed that if he considered them as individuals, the majority had no right to bind the minority; that one individual

<sup>3</sup> Mr. Justice Gresham in *Fargo v. L. N. etc. Ry. Co.*, 6 Fed. 787.

<sup>4</sup> *Illinois, etc. Society v. Baldwin*, 86 Ill. 479; *Olmsted v. Farmer, etc. Co.*, 50 Mich. 200.

<sup>5</sup> *Elsas v. Alford* (1878), 1 City Ct. Rep. (N. Y.) 123.

<sup>6</sup> *People v. Board of Trade* (1875), 80 Ill. 137; *Robinson v. Yates City Lodge* (1877), 86 Ill. 599; *Conriff v. Jamour* (1900), 31 Misc. Rep. 729, 65 N. Y. Supp. 3.

<sup>7</sup> *Union, etc. Assn. v. Lutz* (1892), 50 Ill. App. 176.

had as good a right to possess the property as any other unless he can be affected by some agreement.<sup>8</sup> No change can be made in the constitution of such companies and associations without the consent of the whole body of subscribers.<sup>9</sup> If any one article might be abolished by a vote of the majority, so might every other article; and the rights and property of each individual member might be placed in the utmost jeopardy.<sup>10</sup> The only exception to this general rule that the majority can not bind the minority without a special agreement, are the cases of partnership, where the interest is joint, not in common, and of the part owners of a ship. In the former case the principle is not that a majority can bind the minority, but that each partner, having a joint interest in the whole concern, may bind all the partners. The constitution and by-laws of a voluntary association constitute a contract between the members.<sup>11</sup> Service of process upon its officers is sufficient to give the court jurisdiction over the members.<sup>12</sup> Incorporation of a number of members, even by vote of the association, does not merge it into the corporation.<sup>13</sup>

**§ 1362. Government by managing boards of trustees, committees.**—The managing boards of all of the unincorporated associations are treated by the courts exactly as are regular boards of incorporated companies chosen in conformity to the requirements of the statutes under which their company is incorporated.<sup>14</sup> A club generally consists of trustees, in whom the property of the club is vested in trust for the members for the time being; a committee, who manage the affairs of the club; and the ordinary members.<sup>15</sup> The powers of the committee vary in different clubs. Their ordinary duties are to select, look after, and dismiss the servants; see that the furniture, provisions, books, papers, and the like required by the members are duly furnished; and generally to superintend the domestic arrangements of the club. These duties mainly bring them into contact with persons outside the club, except in so far as it is their duty to attend to

<sup>8</sup> *Lloyd v. Loaring*, 6 Ves. 773.

<sup>12</sup> *Fitzpatrick v. Rutter* (1896), 160 Ill. 282, 43 N. E. 392.

<sup>9</sup> *Davies v. Hawkins*, 3 Maule & Sel. 488, *per* Lord Ellenborough; *Livingston v. Lynch* (1820), 4 Johns. Ch. 573, 579, 598, *per* James Kent, Chancellor.

<sup>13</sup> *McFadden v. Murphy* (1889), 149 Mass. 341.

<sup>10</sup> *Livingston v. Lynch* (1820), 4 Johns. Ch. 573, 598.

<sup>14</sup> "Directors of Corporations," by Joseph A. Joyce, 19 Cent. L. J. 305.

<sup>11</sup> *Hammerstrom v. Parsons* (1889), 38 Mo. App. 333.

<sup>15</sup> *Leach's Club Cases*, 15.

all complaints and suggestions of members in regard to internal arrangements.<sup>16</sup> The house-committee of a club may bind the club by their contracts and representations. Thus, where the board of management of a club was authorized by the by-laws to make all necessary contracts and regulations, and the officers of the club, acting under a resolution of the board of management, contracted to lease the club-house to one who agreed to maintain a restaurant for the exclusive use of the members and their guests, subject to the approval of the house-committee, it was held that the caterer might recover for refreshments furnished to guests of the club at the request of members of the house-committee.<sup>17</sup> But the most important part of the duties of the managing board, and that which has most of all brought clubs under judicial notice, is that of enforcing the rules and maintaining the harmony of the club, and of sitting in judgment on the conduct of any member who is alleged to have infringed the rules or interrupted that harmony.<sup>18</sup>

**§ 1363. May hold, acquire and transfer land by trustees, or as tenants in common. Syndicates. May take by devise or bequest.**—The rule is, an association of persons, unincorporated, has no legal capacity to take or hold real property.<sup>19</sup> And therefore a grant to such association *eo nomine* would pass no legal title.<sup>20</sup> The fact that a deed was made to three grantees in trust for an association, there being no intimation as to who were the persons associated, has been held not to save it from being void.<sup>21</sup> But it has been lately held, that a deed of land to such an unincorporated association not empowered to take and hold land, but the members of which are ascertainable,—may be construed as a grant to such members as tenants in common.<sup>22</sup> And that such an association having land, it could be conveyed by a deed from all the members of the association.<sup>23</sup>

<sup>16</sup> Leach's Club Cases, 15.

<sup>17</sup> Deller v. Staten Island Athletic Club (1890), 9 N. Y. Supp. 876.

<sup>18</sup> Leach's Club Cases, 15.

<sup>19</sup> German Land Assn. v. Schol-  
ler (1865), 10 Minn. 338.

<sup>20</sup> Jackson City v. Cory, 8 Johns. 385; Hornbeck v. Westbrook, 9 Johns. 75; Jackson v. Sisson, 2 Johns. Cas. 321; Sheppard's Touchstone, 235; Swaine v. Mc-  
Cohany, 4 Ohio, 157; Thomas v.

Marshfield, 10 Pick. 364; Bartlett v. King, 12 Mass. 537; Hamblett v. Bennett, 6 Allen, 140; Tucker v. Seaman's Aid Soc., 7 Metc. 188.

<sup>21</sup> German Land Assn. v. Schol-  
ler (1865), 10 Minn. 338; Gallegos v. Att'y-Gen., 3 Leigh, 450;  
Wheeler v. Smith, 9 How. 55.

<sup>22</sup> Byam v. Bickford (1885), 140 Mass. 31, 2 N. E. 687.

<sup>23</sup> A. bought lands with the  
money of an association consist-  
ing of himself and seven others.

Where, therefore, several owners of a tract of land laid it off into town-lots, and formed a company to sell the same, never making any conveyance to the company but receiving their quota of stock, and providing in the articles of association that the president and secretary should execute the deeds, it was held, that this was a joint-stock company, and that each owner's title passed by a deed so executed.<sup>24</sup> After certain corporators had signed an agreement to become a corporation, and before the charter had been obtained, a deed conveying land to their corporation was signed and acknowledged by grantor, and delivered to a third party, with directions to retain it until the corporation obtained its charter and organized, and then to deliver it; and after the charter had been received, and the corporation organized under it, the third person delivered the deed, it was accepted by the corporation, and it was held to operate as a conveyance of the land to the corporation from the date of its delivery.<sup>25</sup> Joint-stock and other unincorporated associations generally, hold their real estate in the name of trustees for their benefit. The trust is an active one, and is not executed at once by force of the statute.<sup>26</sup> When an association holds land in the name of a trustee, for the benefit of the holders of certificates, this constitutes an equitable lien, on the proceeds of the sale of the land, not to be disturbed even by the association's consolidation with another society.<sup>27</sup> For any breach of trust by the trustee, any certificate-holder may cause

He conveyed the land to the association, which, however, being unincorporated, could not take. He and his associates always treated the conveyance as valid, and B. received a deed from the seven members of the association. A.'s heir sued B. in ejectment, and it was held that B. had a good equitable defense as to seven-eights of the land. *Douthitt v. Stinson*, 73 Mo. 199. So where stockholders of a corporation, organized to buy and sell land, furnished the purchase money for certain land which was conveyed to the corporation. It was later determined to abandon the corporation, and form a private association for the same purpose, and in pursuance of such intention the president

and secretary of the corporation conveyed the land to a trustee without a vote of the stockholders, but they surrendered their stock, and accepted shares in the association, and united individually in a conveyance of their titles to the trustee. Such action ratified the trustee's title, which passed by his conveyance to trustees for the association. *Hull v. Glover*, 126 Ill. 122 (1888),

<sup>24</sup> *Batty v. Adams County Comm'rs*, 16 Neb. 44.

<sup>25</sup> *Spring Garden Bank v. Hulings Lumber Co.* (1889), 32 W. Va. 357.

<sup>26</sup> *Hart v. Seymour* (1893), 147 Ill. 598, 35 N. E. 246.

<sup>27</sup> *Crawford v. Gross* (1891). 104 Pa. St. 297, 21 Atl. 356.

his removal.<sup>28</sup> A new association can not claim the land of the association it succeeds, if the members are not the same.<sup>29</sup> A deed to an unincorporated association may be made to vest title in it, upon its incorporation.<sup>30</sup> But a deed to a corporation, not in existence is void.<sup>31</sup>

*Syndicate.*—An association of unincorporated individuals, for the purpose of purchasing and selling securities, is called a “syndicate.” The property is vested in a trustee or trustees, with power of sale, and distribution of the proceeds among the members. It differs from a partnership in that its members are not agents for one another, nor is the syndicate dissolved by the death or withdrawal of any member. Though having an assignable interest in the property of the syndicate, it does not pass to his estate upon his death, nor has he right to a partition of the property.<sup>32</sup> Though the deed be absolute to an individual, it may be construed to be in trust, where in writing he declared he held it for the church.<sup>33</sup> The shareholders of an unincorporated association can not dedicate to the public, any land held for it by a trustee.<sup>34</sup> Such an association may buy, lease, and sell land even though the title is in the name of a trustee. But the association can not have a receiver appointed and the business wound up on the ground that it is illegal.<sup>35</sup> The shares of such a company are generally represented by certificates, and are personal property so far as inheritance tax is concerned, although the property owned by the association consists of real estate.<sup>36</sup> Where the trustees are also beneficiary members of the association, the deed to them does not vest the title in the beneficiaries.<sup>37</sup>

<sup>28</sup> Fisk v. Patton (1891), 7 Utah, 399, 27 Pac. 1.

<sup>29</sup> Allen v. Long (1891), 80 Tex. 261, 16 S. W. 43, 26 Am. St. Rep. 735.

<sup>30</sup> Clifton, etc. Co. v. Randell (1891), 82 Iowa, 89, 47 N. W. 905; Church, etc. v. Algemeine, etc. (1898), 31 N. Y. App. Div. 133; San Diego, etc. Co. v. Frame (Cal. 1902), 70 Pac. Rep. 295; Tilden v. Green (1891), 130 N. Y. 29, 28 N. E. 880, 14 L. R. A. 33, 27 Am. St. Rep. 487.

<sup>31</sup> Provost v. Morgan's, etc. R. R. (1890), 42 La. Ann. 809, 8 South. 584; Utah v. Keith (1899), 18 Utah, 464, 56 Pac. 155; Mc-

Candless v. Inland, etc. Co. (1900), 112 Ga. 291, 37 S. E. 419; Wall v. Mines (1900), 130 Cal. 27, 62 Pac. 386; Consumers' Ice Co. v. Webster (1898), 32 N. Y. App. 592.

<sup>32</sup> Mallory v. Russell, 71 Iowa, 63, 32 N. W. 102, 6 Am. Rep. 776.

<sup>33</sup> Reorganized Church v. Church of Christ (1894), 60 Fed. Rep. 937.

<sup>34</sup> Ward v. Davis (1850), 3 Sandf. 502.

<sup>35</sup> Howe v. Morse (1899), 174 Mass. 491, 55 N. E. 213.

<sup>36</sup> Matter of Jones (1902), 172 N. Y. 575, 65 N. E. 570.

<sup>37</sup> King v. Townshend (1894), 141 N. M. 358, 36 N. E. 513. Appeal of Wheeler, 108 Pa. 162.

*May take by devise or bequest.*—A devise or bequest may be made to an unincorporated association. The title does not fail. It descends to the heir at law, who holds it as trustee for the association.<sup>38</sup> In New York such an association can not take by devise.<sup>39</sup>

**§ 1364. Interest of members in the property of the association.**—Membership in a club which is purely literary or social or scientific, and does not own property, can not be considered a right of property, nor is the right of meeting the other members a vested right of which the courts can take cognizance.<sup>40</sup> But a member of such a club or association as one formed for social purposes or the facilitation of business, has undoubtedly an interest in the general assets of the association as long as he remains a member,<sup>41</sup> which is *prima facie* equal or proportionate.<sup>42</sup> So a bill may be maintained by the members of such an association, for themselves and other members, to compel a trustee to join with his co-trustees in an assignment to their successors of funds of the association on deposit in a savings bank.<sup>43</sup> But, in absence of any rule to the contrary, governing such an association, a member has no severable or transmissible interest, or the right to any proportion of the assets upon ceasing to be a member, although upon dissolution a member would be entitled to share in the effects.<sup>44</sup> Where a voluntary fire company was chartered by the legislature,

<sup>38</sup> American Bible Soc. v. American Tract Soc. (1901), 62 N. J. Eq. 219, 50 Atl. 67.

<sup>39</sup> White v. Howard (1871), 46 N. Y. 144.

<sup>40</sup> Waring v. Medical Soc. (Superior Ct., E. Dist. of Ga. 1869), 8 Am. L. Reg. N. S. 533, where the court said: "The only rights which the relator can have, as a member of the society, are either, first, a right to property; second, a right to membership, with a view to the improvement of the science of medicine; third, a right to practice his profession and collect his fees; or, fourth, a right to meet the members of said society on social equality. Suppose the members of the society refuse to meet with the relator, refuse to discuss medical science with him, refuse to exert any effort, physical or men-

tal, to carry out the purposes of the society, what power of compulsion has this court which it can bring to bear on such recusant members? The bare question shows its impracticability. I must therefore refuse the *mandamus*."

<sup>41</sup> *In re St. James' Club*, 2 De Gex, M. & G. 383, 16 Jur. 1075, 1076, 13 Eng. L. & Eq. 589, 592.

<sup>42</sup> McMahon v. Rauhr, 47 N. Y. 67; Belton v. Hatch, 109 N. Y. 593, 4 Am. St. Rep. 495.

<sup>43</sup> Birmingham v. Gallagher, 112 Mass. 190.

<sup>44</sup> *In re St. James' Club*, 2 De Gex, M. & G. 383, 387, 16 Jur. 1075, 1076, 13 Eng. L. & Eq. 589, 592; McMahon v. Rauhr, 47 N. Y. 67, 70; Belton v. Hatch, 109 N. Y. 593, 4 Am. St. Rep. 495; White v. Brownell, 2 Daly, 329, 356, 4 Abb. Pr. N. S. 162, 191.

and its officers were commissioned by the governor, but had no capital stock, and could not acquire property except by donation, and the only compensation of its members was relief from militia and jury duty, it was held that the heirs of a deceased member had no interest in its property on its dissolution.<sup>45</sup> On the death of a member of a proprietary company, however, his interests and rights descend to his heirs or devisees.<sup>46</sup>

**§ 1365. Admission and expulsion of members.**—The power of electing new members, is an incident to corporate existence. It is not necessary that it should be expressly conferred by the charter. Unless otherwise expressly provided in the constitution or by-laws, it is to be exercised by the whole body of incorporators.<sup>47</sup> Ordinarily, in companies having capital stock, however, the power of admitting new members is not vested in the corporation at large; but is committed to the discretion of the commissioners or officers, or agents authorized to receive subscriptions to the stock; since the usual requisite of membership is simply the ability to enter into a legal contract; and the desirability of an applicant for membership is usually a mere question of ability to pay for the shares allotted him.<sup>48</sup> But in societies and associations not organized primarily for purposes of gain, an election is generally necessary to the admission of new members.<sup>49</sup> Yet even in the case of corporations having capital stock, the mere ownership of shares may not, under the charter or by-laws, constitute membership therein;<sup>50</sup> and when in addition to the ownership of stock, an election to membership is requisite, reference must be had to the spirit and provisions of the charter, to determine by whom the power of admission is to be exercised.<sup>51</sup> If there is no con-

<sup>45</sup> *Mason v. Atlanta Fire Co.*, 70 Ga. 604, 48 Am. Rep. 585.

<sup>46</sup> *Angell & Ames on Corporations* (11th ed.), § 214, citing 2 *Dane's Abridgment*, 698.

<sup>47</sup> *Commonwealth v. Gill* (1838), 3 Whart. 228, 247.

<sup>48</sup> *Vide supra*, § 203, and see 46 L. R. A. 618.

<sup>49</sup> For examples see the statements of facts to the cases cited in section 59, *supra*. As to injunction to restrain admission to membership, see *Thompson v. Society of Tammany* (1879), 17 Hun, 305.

<sup>50</sup> *State v. Primm*, 50 Mo. 87;

*Commonwealth v. Gill* (1838), 3 Whart. 228.

<sup>51</sup> "The power of electing both officers and members is an incident to every corporation. It is not necessary that it should be expressly conferred by the charter. If the power is not expressly lodged in other hands, it is to be exercised by the company at large. *State v. Sibley*, 25 Minn. 387; *Ellerbe v. Faust*, 119 Mo. 653; *Vanck v. Medical Soc.* etc. 38 N. J. Law, 337. But this power of election may, by the charter, be taken from the body at large, and reposed in a body of directors, or

trary charter or by-law provision, a minor may be admitted to membership in a non-stock corporation.<sup>52</sup> The corporation may act arbitrarily and exclude any person in its discretion, and beyond the power of the courts to interfere.<sup>53</sup> But it may not exclude from membership any person in violation of its charter or enabling act; or in pursuance of by-laws which are contrary to public policy.<sup>54</sup>

**§ 1366. Grounds for expulsion.**—At common law there are two sufficient causes for the expulsion of members, to wit, the commission of an indictable offense, or a violation of the duties of membership.<sup>55</sup> “It appears to be well settled that, when the

any other select committee. Whether this has been done, either expressly or by necessary implication, is a question which is to be determined by reference to the provisions and spirit of the charter.” Commonwealth v. Gill (1838), 3 Whart. 228, 247. See, also, Diligent Fire Ins. Co. v. Commonwealth (1874), 75 Pa. St. 291, 296; Waterman on Corporations, 160.

<sup>52</sup> Chicago Mutual Life, etc. Assn. v. Hunt, 127 Ill. 257; McCoy v. Roman Catholic, etc. Co., 152 Mass. 272; Morrison v. Wisconsin, etc. Co., 59 Wis. 162.

<sup>53</sup> Blien v. Rand, 77 Minn. 110; Ellerbe v. Faust, 119 Mo. 653; American, etc. Co. v. Chicago, etc. Exchange, 143 Ill. 210, 36 Am. St. Rep. 385; McKane v. Adams, 123 N. Y. 609, 20 Am. St. Rep. 785.

<sup>54</sup> Diligent Fire Ins. Co. v. Commonwealth, 75 Pa. St. 291; People v. Young Men’s Assn., 41 Mich. 67; St. Paul, etc. Co. v. Minn. etc. Co., 47 Minn. 154.

<sup>55</sup> Bagg’s Case (1816), 11 Coke, 94, 99; Rex v. Town of Liverpool (1759), 2 Burr. 723, 732; State v. Chamber of Commerce (1865), 20 Wis. 63; People v. New York Commercial Assn. (1864), 18 Abb. Pr. 271; People v. Chicago Board of Trade (1867), 45 Ill. 112. Cf. Smith v. Smith (1813), 3 Desaus. Eq. 557; Woolsey v. Independent Order, etc. (Iowa, 1883), 1 Am.

& Eng. Corp. Cas. 172; Fisher v. Keane (1878), 11 Ch. Div. 353; Gardner v. Freemantle, 19 W. R. 256; People v. New York Cotton Exchange (1876), 8 Hun, 216; Dean v. Bennett, L. R. 6 Ch. 489. The right of expulsion from associations of this character may be based and upheld upon two grounds: 1. A violation of such of the established rules of the association as have been subscribed or assented to by the members, and as provide expulsion for such clearly violates the fundamental violation. 2. For such conduct as objects of the association, and if persisted in and allowed would thwart those objects, or bring the association into disrepute. Otto v. Journeyman Taylors’ P. & B. U. (1888), 75 Cal. 308, 7 Am. St. Rep. 156, 159. As the words of the usual expulsion clause—“conduct either in or out of the club”—imply, the conduct for which the member of a club is expelled, need not have any direct connection with the club. It may, indeed, be a circumstance suggesting malice, if the conduct which forms the ground of expulsion is not of such a nature as to give “reasonable and probable” cause for the interference of the committee or club. But this is a question for the jury or judge sitting as a jury, in each case; and in the absence of proved malice, the fact

charter of a corporation is silent upon the subject of expulsion, or grants the power in general terms, there are but three legal causes of disfranchisement: (1) Offenses of an infamous character indictable at common law. (2) Offenses against the corporator's duty to the corporation, as a corporation, as a member of it; and (3) offenses compounded of the two."<sup>56</sup> Charter power, given in general terms, to suspend or expel a member, does not empower the corporation to expel a member for any offense not indictable, or which does not affect the corporate government, or tend to defeat its objects.<sup>57</sup> If the offense of the member comes within either of these causes, it is ground for expulsion, whether or not expressly made so by the by-laws, or rules of the corporation, and although they specify certain causes for expulsion.<sup>58</sup> The power given by charter to expel for specific causes does not, by implication, exclude other causes as ground for expulsion.<sup>59</sup> When the offense is an act contrary to the member's duty to the corporation, it may try, convict and expel him.<sup>60</sup> In Pennsylvania it was held that a corporate member, charged with an indictable offense, could not be expelled in advance of conviction by a jury under the criminal law.<sup>61</sup>

*Among acts which have been held to justify expulsion from membership in non-stock corporations, are: making fraudulent charge by a trustee for money he had not paid; <sup>62</sup> making fraudulent pretense of sickness in order to obtain benefits as a member of a benefit association; <sup>63</sup> refusal of a board of trade member to promptly perform a contract, and although it was not enforceable,*

that the action complained of, neither took its origin in the club, nor had any connection or reference to a club, is not a reason against the exercise of the discretionary power vested in the committee by an expulsion clause. *Labouchere v. Wharncliffe*, 13 Ch. Div. 346, 28 W. R. 367, 41 L. T. 638; see review of this case in *Canada L. Jour.*, Oct. 15, 1881, 381.

<sup>56</sup> *State v. Chamber of Commerce*, 20 Wis. 63; *Commonwealth v. St. Patrick, etc. Soc.*, 2 Binn. (Pa.) 441, 4 Am. Dec. 453; *People v. New York, etc. Assn.*, 18 Abb. Pr. (N. Y.) 271; *Evans v. Philadelphia Club*, 50 Pa. St. 107.

<sup>57</sup> *State v. Chamber of Commerce, etc.*, 20 Wis. 63.

<sup>58</sup> *People v. New York, etc. Underwriters*, 7 Hun (N. Y.), 248.

<sup>59</sup> *Commonwealth v. St. Patrick Benev. Soc.*, 2 Binn. (Pa.) 441, 4 Am. Dec. 453.

<sup>60</sup> *Commonwealth v. St. Patrick Benev. Soc.*, 2 Binn. (Pa.) 441, 4 Am. Dec. 453.

<sup>61</sup> *Commonwealth v. St. Patrick Benev. Soc.*, 2 Binn. (Pa.) 441, 4 Am. Dec. 453.

<sup>62</sup> *Commonwealth v. Guardian, etc.*, 6 Serg. & R. (Pa.) 469.

<sup>63</sup> *Society, etc. v. Commonwealth*, 52 Pa. St. 125, 91 Am. Dec. 139.

because not in writing as required by the statute of frauds;<sup>64</sup> enlisting as a soldier in active service, contrary to the prohibition of a by-law;<sup>65</sup> violating the by-law of a board of trade, prohibiting the gathering in any public place near its exchange, for trading in "futures," either before the opening, or after the time for closing;<sup>66</sup> fraudulently altering a physician's certificate, in order to increase "sick benefits" as member of a benefit society;<sup>67</sup> allowance of rebates to customers contrary to rules of a merchants' exchange;<sup>68</sup> charging lower rates than those fixed by the members of a board of fire underwriters;<sup>69</sup> failure to pay fine or assessment expressly provided by contract of membership in a benefit association;<sup>70</sup> resuming medical practice, contrary to agreement, in the same locality where, as member of a medical society, he had sold out his practice;<sup>71</sup> offer by member of a medical society to practice either as allopath or homeopath, as might be desired by the patient.<sup>72</sup> It has been held that original disqualification for election to membership is ground for subsequent expulsion therefrom;<sup>73</sup> but, under a statute in a New York case of such disqualification, and where membership was obtained under false representations, it was held no ground for expulsion by resolution of the corporation, but that it could be inquired into by the court, only by *quo warranto*.<sup>74</sup> As examples of acts or grounds which have been held insufficient to justify expulsion, are the following: becoming surety on the official bond of a negro elected to office, and upon bonds of negroes charged with inciting a riot;<sup>75</sup> because the member's political views, and acts as a politician, are distasteful to the other members of the medical society;<sup>76</sup> using offensive

<sup>64</sup> *Dickenson v. Chamber of Commerce*, etc., 29 Wis. 45, 9 Am. Rep. 544; *Lewis v. Wilson*, 121 N. Y. 284; *People v. New York*, etc., 149 N. Y. 401.

<sup>65</sup> *Franklin, etc. Assn. v. Commonwealth*, 10 Pa. St. 357.

<sup>66</sup> *State v. Milwaukee*, 47 Wis. 670.

<sup>67</sup> *Commonwealth v. Philanthropic Soc.*, 5 Binn. (Pa.) 486.

<sup>68</sup> *Jackson v. South Omaha, etc.* 49 Neb. 687.

<sup>69</sup> *People v. New York Board, etc.*, 7 Hun (N. Y.), 248.

<sup>70</sup> *Muere v. Detroit, etc.*, 95 Mich. 451; *State v. Stevedores, etc. Assn.*, 43 La. Ann. 1098; Med-

ical, etc. Co. v. *Weatherby*, 75 Ala. 248; *Karcher v. Supreme Lodge*, etc. 137 Mass. 371; *Whiteside v. Nyack, etc.*, 142 N. Y. 585.

<sup>71</sup> *Barrow v. Mass. Med. Soc.*, 12 Cush. (Mass.) 402.

<sup>72</sup> *Ex parte Paine*, 1 Hill (N. Y.) 665. .

<sup>73</sup> *Beesley v. Chicago, etc. Assn.*, 44 Ill. App. 278; *Diligent Fire Co. v. Commonwealth*, 75 Pa. St. 291.

<sup>74</sup> *Fawcett v. Charles*, 13 Wend. (N. Y.) 473.

<sup>75</sup> *State v. Georgia Med. Soc.*, 38 Ga. 608, 95 Am. Dec. 408.

<sup>76</sup> *State v. Georgia Med. Soc.*, 38 Ga. 608, 95 Am. Dec. 408.

words in debate, not noticed or objected to until a subsequent meeting;<sup>77</sup> advertising a particular remedy by a member of a medical society;<sup>78</sup> refusing to join in a labor strike;<sup>79</sup> refusing to take sacrament according to the forms and practice of a particular church, or sect;<sup>80</sup> refusing to submit a controversy to the arbitration committee of a board of trade, after instituting suit upon it;<sup>81</sup> selling his seat in the board, after the managers had declared against his title to it;<sup>82</sup> refusing to pay the award of an arbitration committee, on the ground that the association had no jurisdiction in the premises.<sup>83</sup> But a member does not forfeit his membership by failing to pay an assessment not made in accordance with the constitution of the order, and the fact that the assessment was made in accordance with a custom of which he is not shown to have had knowledge, is not sufficient to justify his expulsion for non-payment thereof.<sup>84</sup>

*Waiver by the corporation.*—If the corporation consents to, or acquiesces in, the violation of a by-law, or other act in violation of duty, and which is ground for expulsion, the corporation thereby waives the right to expel the member for that act.<sup>85</sup>

**§ 1367. Review by the courts. Jurisdiction.**—It is an ancient and well established rule of English law that no person shall be dispossessed of a place of profit or honor, or be deprived of rights which he has acquired by contract or otherwise, without a fair trial, and without the exercise of a *bona fide* and sound discretion on the part of those who claim the power so to dispossess or deprive him.<sup>86</sup> It has been said, on the other hand, that the source of equitable jurisdiction is in some infringement of the property rights of members; that while the court will interfere for the purpose of protecting property rights of members of unincorporated associations in all proper cases, and when it takes jurisdiction, will follow and enforce, so far as applicable, the rules apply-

<sup>77</sup> People v. American Institute, etc., 44 How. Pr. (N. Y.) 468.

<sup>78</sup> People v. Med. Soc. etc., 32 N. Y. 187.

<sup>79</sup> People v. N. Y. Benev. Soc., 3 Hun (N. Y.), 361; Otto v. Journey-men Tailors, etc., 75 Cal. 308, 7 Am. St. Rep. 156.

<sup>80</sup> People v. St. Franciscus Benev. Soc., 24 How. Pr. (N. Y.) 216.

<sup>81</sup> State v. Chamber of Commerce, 20 Wis. 63.

<sup>82</sup> People v. New York Cotton Exchange, 8 Hun (N. Y.), 216.

<sup>83</sup> Savannah Cotton Exchange v. State, 54 Ga. 668.

<sup>84</sup> Underwood v. Iowa Legion of Honor, 66 Iowa, 134.

<sup>85</sup> Harmstead v. Washington Fire Co., 1 Leg. Gaz. (Pa.) 392.

<sup>86</sup> Willis v. Child, 13 Beav. 117; Deane v. Bennett, L. R. 6 Ch. 489.

ing to incorporated bodies of the same character,<sup>87</sup> yet that where no property rights are involved, there is no jurisdiction.<sup>88</sup>

*Grounds of equitable intervention.*—Only courts of equity have jurisdiction of unincorporated societies, and it is with reluctance that they will exercise it.<sup>89</sup> A court will not interfere in case of a partnership merely because the partners do not agree, and there is certainly greater reason why it should not interfere in case of other associations concerning mere internal regulation and discipline.<sup>90</sup> In other words, the court will not interfere where the rules are reasonable, and have been strictly observed, unless it be shown that the club has acted maliciously and not in good faith. It is not for the court to say whether what was done was right, or even whether the decision was reasonable.<sup>91</sup> The only question is whether it was done *bona fide*, and the mere fact that the decision was unreasonable is not a sufficient ground for interference, unless it was so manifestly absurd and idle as to show a want of good faith.<sup>92</sup> Accordingly, a court of equity can not decree a dissolution and distribution because of an unauthorized expulsion.<sup>93</sup> But the court will interfere in reference to the expulsion of members from societies and social clubs, where the decision of the association can be shown to be contrary to natural justice, or that what has been done is contrary to the rules, or that there has been malice in arriving at the decision.<sup>94</sup>

<sup>87</sup> Rigby v. Connol, 14 Ch. Div. 482.

<sup>88</sup> Otto v. Journeyman Tailors' P. & B. U. (1888), 75 Cal. 308, 7 Am. St. Rep. 156, 159; Rigby v. Connol, 14 Ch. Div. 482, 49 L. J. Ch. 328, 42 L. T. 139; Sale v. First Regular Baptist Church, 62 Iowa, 26, 49 Am. Rep. 136; Burke v. Roper, 79 Ala. 138.

<sup>89</sup> See Note to Austin v. Searing, 69 Am. Dec. 665. The power of unincorporated societies to expel members, and the jurisdiction of courts to interfere concerning expulsions, will be found considered in the notes to Hiss v. Bartlett, 63 Am. Dec. 776; and Austin v. Searing, 69 Am. Dec. 665.

<sup>90</sup> 2 Lindley on Partnerships, \*466.

<sup>91</sup> Williams' Forensic Facts & Fallacies (1885), 115.

<sup>92</sup> Williams' Forensic Facts & Fallacies (1885), 115.

<sup>93</sup> Burke v. Roper, 70 Ala. 138; Lafond v. Deems, 81 N. Y. 507, 8 Abb. N. Cas. 344; Fischer v. Raab, 57 How. Pr. 87, 94; Thomas v. Ellmaker, 1 Pars. Sel. Cas. 98. *Contra*, Gorman v. Russell, 14 Cal. 531, 18 Cal. 688.

<sup>94</sup> Otto v. Journeyman Tailors' P. & B. U. (1888), 75 Cal. 308, 7 Am. St. Rep. 156, 159, citing Hirschl on Fraternal Societies, 56 Dawkins v. Antrobus, 44 L. T. 557, L. R. 17 Ch. Div. 615; Lambert v. Addison, 46 L. T. 20. "We are referred to the provision of appellant's constitution which provides that 'any member having a grievance shall have the right to lay his case before the central body, who shall take action thereon, and whose decision shall be

§ 1368. Remedy for unlawful expulsion.—The usual remedy of a member of an unincorporated association, who is, or is about to be, unlawfully expelled, is by injunction to restrain the officers of the association or other members from interfering with his enjoyment of the privileges of membership, or to restrain the threatened resolution of expulsion.<sup>95</sup> Or, if the member has been already expelled, *mandamus* may issue in a proper case for his reinstatement.<sup>96</sup> In some cases wrongful expulsion may be enjoined by a court of equity;<sup>97</sup> but it will not assume jurisdiction unless in exceptional cases, rendering its interference necessary inasmuch as the expelled member generally has adequate relief at law by *mandamus*.<sup>98</sup>

final.' No doubt, when an action is properly taken in the manner indicated, it is final and the courts will not interfere; but when under the guise of remedying the grievance of a member, the central body acts in bad faith and maliciously makes the subject of the grievance a pretext for oppression and wrong, its action may, however, to that extent, be the subject of review." Otto v. Journeyman Tailors' P. & B. U. (1888), 75 Cal. 308, 7 Am. St. Rep. 156, 160.

<sup>95</sup> Niblack on Mutual Benefit Societies, § 63; Thomas v. Ellmaker, 1 Pars. Sel. Cas. 98; Fitz v. Muck (1881), 62 How. Pr. 69, 73-75; Leech v. Harris (1870), 2 Brewst. (Pa.) 571. Cf. Society of Italian Union, etc. v. Montedonico (Ky. 1884), 4 Am. & Eng. Corp. Cas. 22. But an injunction to restrain a medical society has been refused in Massachusetts. Gregg v. Massachusetts Medical Soc. (1872), 111 Mass. 185. Cf. "Law of Clubs," by Louis Claude Whiton (1883), 27 Alb. L. J. 326.

<sup>96</sup> Black & White Smiths' Soc. v. Vandyke (1836), 2 Wharton (Pa.), 309; Commonwealth v. German Soc. (1850), 15 Pa. St. 251; People v. Saint Francisco's Benevolent Soc. (1862), 24 How. Pr. 216; State v. Carteret Club, 40 N. J. 295; People v. Medical Soc. of

Erie Co. (1865), 32 N. Y. 187; People v. New York Benevolent Soc. (1875), 3 Hun, 361; Medical, etc. Soc. v. Weatherby, 75 Ala. 248. One who has been illegally expelled from an unincorporated voluntary benevolent association may maintain an action against its president to compel restoration to membership. If the rules of the association failed to provide for notice of the proceedings for expulsion, they were unreasonable, and the member, notwithstanding them, was entitled to notice and to an opportunity to be heard. Weekly payments which the member declared himself entitled to because of sickness, and of which he claimed that he was unjustly deprived during the period of his expulsion, cannot, however, be recovered, the association, in the absence of fraud, being the sole judges of the propriety of making such payments. Fitz v. Muck (1881), 62 How. Pr. 69.

<sup>97</sup> Albers v. Merchants' Exchange, etc., 39 Mo. App. 583; Hall v. Supreme Lodge, etc., 24 Fed. 450; Leech v. Harris, 2 Brewst. (Pa.) 571.

<sup>98</sup> Sturges v. Board of Trade, etc., 86 Ill. 441; White v. Brownell, 4 Abb. Pr. (N. Y.) 162; Gregg v. Mass. Med. Soc., 111 Mass. 185, 15 Am. Rep. 24.

*Mandamus* will lie to compel his restoration to membership, where a member has been expelled without sufficient cause,<sup>99</sup> or without reasonable notice and opportunity for hearing, or without compliance with the charter and by-laws, in such case prescribed.<sup>1</sup> He has no remedy, however, by a decree of dissolution.<sup>2</sup> And if the expulsion has been regular and authorized by the charter or under statute, *mandamus* will not issue.<sup>3</sup> Nor will one be reinstated by the court who for nineteen years has acquiesced in his expulsion from the membership of a corporation for non-payment of corporate dues.<sup>4</sup> In another case, the plaintiff who, six years before, had been expelled from a benevolent society, brought suit to be restored to membership. It appeared that he had previously sued for certain benefits, and that the suit had been determined against him on the ground that he had been expelled; and it was held that the former suit constituted an effectual bar to his proceeding for restoration to membership.<sup>5</sup> The legality of an expulsion is not to be collaterally questioned.<sup>6</sup> In a collateral proceeding the courts will not inquire into the regularity of the proceeding in the expulsion of a member of an incorporated benefit society, where notice, trial and expulsion were voted in compliance with the provisions of the charter and by-laws.<sup>7</sup>

*The remedy within the association to be exhausted before application to the court.*—So long as the government is fairly and honestly administered, those who have grievances should be required in the first instance to resort to the remedies for redress

<sup>99</sup> *Otto v. Journeymen, etc.*, 75 Cal. 308, 7 Am. St. Rep. 156; *State v. Georgia Med. Soc.*, 95 Am. Dec. 408; *Sibley v. Board, etc.*, 40 N. J. Law, 295; *People v. Musical, etc. Union*, 118 N. Y. 101; *Meurer v. Detroit, etc. Assn.*, 95 Mich. 451.

<sup>1</sup> *Delacy v. Neuse River, etc. Co.*, 1 Hawks (N. C.), 274, 9 Am. Dec. 636; *People v. Mechanics' Aid Soc.*, 22 Mich. 86.

<sup>2</sup> *Burke v. Roper*, 79 Ala. 138; *Thomas v. Ellmaker*, 1 Pars. Sel. Cas. 98; *Fischer v. Raab*, 57 How. Pr. 87, 94. The case of *Gorman v. Russell*, 14 Cal. 531, 18 Cal. 688, to the contrary, is opposed to principle and authority.

<sup>3</sup> *Commonwealth v. Pike Bene-*

*ficial Soc.* (1844), 8 Watts & S. 247; *People v. Fire Underwriters* (1876), 7 Hun, 248.

<sup>4</sup> *Bostwick v. Detroit Fire Department*, 49 Mich. 513.

<sup>5</sup> *Bachmann v. New Yorker Deutscher Arbeiter Bund*, 12 Abb. N. Cas. 54, 64 How. Pr. 442.

<sup>6</sup> *Black & White Smiths' Soc. v. Vandyke* (1836), 2 Wharton (Pa.), 309; *Commonwealth v. Pike Beneficial Soc.* (1844), 8 Watts & S. 247; *Society for the Visitation of the Sick v. Meyer* (1866), 52 Pa. St. 125, 131. Cf. *Commonwealth v. Oliver* (1849), 2 Parson's Sel. Cases, 420, 426.

<sup>7</sup> *Black, etc. Soc. v. Vandyke*, 2 Whart. (Pa.) 309, 30 Am. Dec. 263.

provided by the rules and regulations.<sup>8</sup> Thus, a broker having been suspended as a member of the stock exchange, on his confession of insolvency, can not be reinstated, or maintain any claim against the association, except in accordance with its rules, and where they provide an ample remedy, equity will not relieve.<sup>9</sup> For, if the constitution or by-laws provide a remedy within the association for a suspended or expelled member, then he must avail himself of that remedy before he can ask the courts to interfere.<sup>10</sup> And, at all events, he will be obliged to exhaust the remedies provided for by the constitution and by-laws of the association, before he can appeal to the courts.<sup>11</sup> He must first, within the organization itself, exhaust all his remedies by appeal or otherwise, and although the appellate body is a corporation of another State;<sup>12</sup> but a resort to that remedy is excused if it be clearly useless.<sup>13</sup> Thus, an adverse vote of fourteen members of a committee of twenty justifies the expelled member in applying to the court before making a motion before the committee to reconsider their determination.<sup>14</sup> But an abolition of the right of appeal does not excuse the member from exhausting his remedy within the association before applying to the courts when it does not appear that an appeal would have been necessary.<sup>15</sup>

<sup>8</sup> LaFond v. Deems, 81 N. Y. 507, 514, 8 Abb. N. Cas. 344, 349; per Miller, J.

<sup>9</sup> Moxey v. Philadelphia Stock Exchange, 14 Phila. 185.

<sup>10</sup> Screwmen's Benef. Assn. v. Benson (Tex. 1890), 13 S. W. Rep. 379, holding that where the constitution of a charitable corporation reserves to a member expelled by the board of trustees the right to appeal to the members of the corporation at a corporate meeting *mandamus* will not issue in favor of an expelled member who has taken no appeal from the action of the board, though the order of expulsion may be contrary to law and void; White v. Brownell, 2 Daly, 329, 365, 4 Abb. Pr. (N. S.) 162, 199; Lafond v. Deems, 81 N. Y. 507, 8 Abb. N. Cas. 344; Niblack on Mutual Benefit Societies, §§ 130, 131; Chamberlain v. Lincoln, 129 Mass.

70; Karcher v. Supreme Lodge K. of H., 137 Mass. 368, 372; Oliver v. Hopkins, 144 Mass. 175; Poultney v. Bachman, 31 Hun, 49; McAlees v. Supreme Sitting Order of Iron Hall (Sup. Ct. Pa. 1888), 12 Cent. Rep. 415; McCallion v. Hibernia Savings & Loan Soc. (1886), 70 Cal. 163, *per* McKee, J.

<sup>11</sup> Poultney v. Bachman, 31 Hun, 49; McAlees v. Supreme Sitting Order of Iron Hall (Sup. Ct. Pa. 1888), 12 Cent. Rep. 415; Oliver v. Hopkins, 114 Mass. 175.

<sup>12</sup> Grosvenor v. United Soc. etc., 118 Mass. 78; Zeliff v. Grand Lodge, etc., 53 N. J. Law, 536; Karcher v. Supreme Lodge, etc., 137 Mass. 368; Reno Lodge, etc. v. Grand Lodge, etc., 54 Kan. 73.

<sup>13</sup> Loubat v. Le Roy, 40 Hun, 546, reversing 15 Abb. N. Cas. 1.

<sup>14</sup> Loubat v. Le Roy, 40 Hun, 546, reversing 15 Abb. N. Cas. 1.

<sup>15</sup> Lafond v. Deems, 81 N. Y. 507.

§ 1369. **Expulsion from stock companies.**—Where a non-stock corporation has statutory authority to provide by by-laws for expulsion of members, and appoints a committee to hear and determine the controversy, the accused is entitled to due notice of the time and place of hearing.<sup>16</sup> The by-laws are supreme authority for trial of charges against a member. Unless they are unreasonable, a court of equity will not interfere.<sup>17</sup> A court may pass upon the jurisdiction of the board to expel a member of an incorporated stock exchange.<sup>18</sup> A stock exchange may expel a member for non-fulfilment of his contracts made as a member of the exchange, and within it,<sup>19</sup> but not for bringing a suit in court, instead of submitting his complaint to arbitration.<sup>20</sup> There is no power of expulsion from a corporation having capital stock, unless the power is expressly conferred by charter or statute. Herein is a difference between the powers of a stock and of a non-stock corporation.<sup>21</sup> In companies having capital stock, there is no power of expulsion independently of statutory or charter provisions.<sup>22</sup> Such a company has no power to pass by-laws respecting the expulsion of members.<sup>23</sup> Incorporated stock companies, without express charter authority, have no power to expel a member, and it is even questioned whether such a corporation has the power to fine a member for violation of its laws.<sup>24</sup> But unincorporated companies may forfeit membership for non-payment of dues.<sup>25</sup> Membership, generally speaking, consisting merely in owning a share in the capital stock,<sup>26</sup> a shareholder can

<sup>16</sup> *People v. East Buffalo, etc. Assn.* (1903), 84 N. E. 795.

<sup>17</sup> *Wood v. Chamber of Com., etc.* (Wis. 1903), 96 N. W. 835.

<sup>18</sup> *People v. N. Y. Produce Exchange* (1896), 149 N. Y. 401.

<sup>19</sup> *Lewis v. Wilson* (1890), 121 N. Y. 234.

<sup>20</sup> *People v. N. Y. Cotton Exchange* (1876), 8 Hun, 216.

<sup>21</sup> *State v. Milwaukee, etc.* (1879), 47 Wis. 670; *Monroe, etc. Assn. v. Webb* (1899), 40 N. Y. App. Div. 49.

<sup>22</sup> *In re Long Island R. Co.*, 19 Wend. 37, 32 Am. Dec. 429; *Evans v. Philadelphia Club* (1865), 50 Pa. St. 107; *State v. Chamber of Commerce* (1879), 47 Wis. 670; *Dickenson v. Chamber of Commerce* (1871), 29 Wis. 45, in which

it is held that there may be a lawful expulsion under a valid by-law. Cf. upon the "Power of Expulsion" contributed article by A. G. McKean, in 17 L. J. (Eng.) 205; "Remedies for Improper Expulsion and Suspension from Societies and Fraternities," by Eugene McQuillin (1890), 30 Cent. L. J. 327.

<sup>23</sup> *People v. Saint Francisco's Benevolent Soc.* (1862), 24 How. Pr. 216; *Roehler v. Mechanics' Aid Soc.*, 22 Mich. 86; *Green v. African Methodist Epis. Soc.*, 1 Serg. & R. 254.

<sup>24</sup> *Monroe, etc. Assn. v. Webb* (1899), 40 N. Y. App. Div. 49.

<sup>25</sup> *Denver Chamber of Commerce v. Green* (1896), 8 Colo. App. 420.

<sup>26</sup> *Vide supra*, § 202.

not be deprived of his right to participate in the corporate affairs, save by forfeiture of his stock for failure to pay calls and assessments. But even this power of forfeiture does not exist independently of charter or statutory authority, and can not be created by a by-law,<sup>27</sup> the remedy of the corporation at common law being by an action against the shareholder to recover the amount due upon the stock.<sup>28</sup> A clear distinction is recognized between the powers of corporations, and that of non-incorporated societies to expel members. Where a corporation expels a member, whether by virtue of express power under its charter, in pursuance of its by-laws, or through the inherent power attaching to it, the courts will, at the instance of the expelled member, investigate the action of the corporation, determine whether it acted in accordance with its power, whether the by-laws were legal and reasonable, whether the expulsion was fair and just, and whether the cause of expulsion was such as would produce an injury to the corporation.<sup>29</sup>

**§ 1370. Suspension from membership.**—A person suspended from membership is thereby debarred from exercising the rights and enjoying the privileges and benefits incident thereto.<sup>30</sup> The penalty of suspension is frequently imposed upon members of lodges and mutual benefit societies for delinquency in non-payment of dues. And it is held that the beneficiaries of a member of a benevolent society, who stands suspended for non-payment of assessments, by operation of the laws of the society, at the time of his death, can not recover on the benefit certificate on the ground that the subordinate lodge of which he was a member had continued to treat him as a member, and to treat his unpaid dues to

<sup>27</sup> *Perrin v. Granger*, 30 Vt. 595; *Williams v. Lowe*, 4 Neb. 382; *In re Long Island R. Co.*, 19 Wend. 37, 32 Am. Dec. 429; *Cartan v. Father Matthew, etc. Soc.*, 3 Daly, 20; *Hill v. Nisbet*, 100 Ind. 341; *Westcott v. Minnesota, etc. Co.*, 23 Mich. 145; *Adley v. Reives*, 2 *Maule & S.* 53; *Dixon v. Evans*, L. R. 5 H. L. 606; *Clarke v. Hart*, 6 H. L. Cas. 633; *Campbell's Case*, L. R. 9 Ch. 1; *Kirk v. Norwill*, 1 Term. Rep. 118. See, however, *Lesseps v. Architects' Co.*, 4 La. Ann. 316, where it was held that the acceptance of certificates at the foot of which was printed a by-law providing for forfeiture

was "a tacit acquiescence in and submission to the by-law." Cf. *Knight's Case*, L. R. 2 Ch. 321; *Perrin v. Granger*, 30 Vt. 595; *Kennebec, etc. R. Co. v. Kendall*, 31 Me. 470.

<sup>28</sup> This subject is treated in detail in CALLS AND ASSESSMENTS, *supra*, §§ 302-337a.

<sup>29</sup> *Hiss v. Bartlett*, 3 Gray, 468, 63 Am. Dec. 768, and the annotations, 772-778.

<sup>30</sup> *Knights of Honor Supreme Lodge v. Abbott*, 82 Ind. 1; *Borggraefe v. Knights of Honor*, 22 Mo. App. 127; *Manson v. Grand Lodge*, 30 Minn. 509.

the supreme lodge as dues payable to the subordinate lodge, for which it had extended him credit.<sup>31</sup> These cases turn largely upon the construction of the by-laws of the lodge or order. In a Minnesota case the by-laws of a benevolent association provided that a member who should fail to pay an assessment should be suspended, but that a payment within three months should reinstate him; and another provision of the by-laws provided for the action of the association in cases where members delinquent for more than three months should desire to pay and obtain a restoration of their rights. A member delinquent for less than three months, paid an assessment while on his death-bed, and it was held that his rights were thus restored without action on the part of the association.<sup>32</sup> Where a by-law of a benevolent society provided that any subordinate lodge in arrears should stand suspended, and no death-benefit should be paid if a death occurred during the suspension, it was held that the by-law was not to be construed as cutting off the right to receive the benefit, except during the continuance of the suspension.<sup>33</sup>

**§ 1371. Withdrawal from membership.**—The legal questions involved in cases of voluntary withdrawal from corporate bodies relate to its effect upon the member's interest in the property and upon his liability to creditors. Whether the consent of the society or company has been given, is not usually in issue in cases of withdrawal from voluntary associations; but from companies having capital stock, the member or shareholder can not sever his connection so as to relieve himself from liability to the corporation or its creditors by a mere abandonment of his shares, without the consent of the corporation;<sup>34</sup> and under certain cir-

<sup>31</sup> *Borgraef v. Knights of Honor*, 22 Mo. App. 127.

<sup>32</sup> *Manson v. Grand Lodge*, 30 Minn. 509.

<sup>33</sup> *Knights of Honor Supreme Lodge v. Abbott*, 82 Ind. 1.

<sup>34</sup> *Laurel Run Building Assn. v. Sperring*, 106 Pa. St. 334; *Rockville, etc. Turnpike Co. v. Maxwell*, 2 Cranch, C. C. 451; *Mills v. Stewart*, 41 N. Y. 384; *Selma, etc. R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344; *United Society v. Eagle Bank*, 7 Conn. 456; *Bishop's Fund v. Eagle Bank*, 7 Conn. 476; *Klein v. Alton, etc. R. Co.*, 13 Ill. 514; *Ryder v. Alton, etc. R. Co.*,

13 Ill. 516; *Muskingum Valley Turnpike Co. v. Ward* (1844), 13 Ohio, 120, 127, 42 Am. Dec. 191, saying, "for an individual cannot release himself from the obligation of a contract against the consent of the obligee; and the defendant's subscription to the capital stock of the plaintiff is a contract." *Johnson v. Wabash, etc. Plank Road Co.*, 16 Ind. 389; *Hughes v. Antietam Manuf. Co.*, 34 Md. 316. Cf. *Payne v. Bullard*, 23 Miss. 88, 55 Am. Dec. 74; *Morawetz on Private Corporations*, § 109. "If the contract to pay for and take the stock was a valid con-

cumstances the consent of the creditors also is requisite.<sup>35</sup> For the company has a lien against his shares for debts due it from him;<sup>36</sup> the other shareholders have a right to require him to meet his proportion of the common liabilities,<sup>37</sup> and the corporate creditors have an interest in the unpaid balance due upon his subscription.<sup>38</sup>

**§ 1372. Assessments upon members of unincorporated associations.**—A member of a voluntary association is under a legal obligation to pay an assessment duly levied in accordance with the rules of the society during the time of his connection therewith.<sup>39</sup>

tract, made upon a sufficient consideration, then his subscription was not open to revocation. Until the incorporation of the company was perfected, the other subscribers had an interest in its execution and performance of which they could not be deprived by the act of the defendant; and after the articles were filed and recorded in the secretary's office, and the corporation had a legal existence, it acquired a vested interest in the defendant's agreement." Lake Ontario, etc. R. Co. v. Mason, 16 N. Y. 451, 463. "But what are the acts of 'rescission' or 'repudiation' (for both terms are used, though they are far from convertible) which the shareholder must do. He can file his bill, or he can give notice of a motion for rectification of the share-register under section 35, of the Companies Act of 1862; of which two proceedings the second is the simplest, while the first will be preferred where the bare rectification of the register does not meet all the party's requirements, as, for instance, where an injunction against calls is wanted." "What is 'Repudiation' of Shares," 16 Sol. J. & Rep. 365.

<sup>35</sup> *Vide supra*, §§ 244, 245.

<sup>36</sup> Laurel Run Building Assn. v. Sperring, 106 Pa. St. 334. Under Ind. Rev. Stat., § 3410, providing that "no stockholder shall be entitled to withdraw whose stock is

held in pledge for security," it was held that a stockholder who had borrowed from the corporation and pledged his stock as security, could not withdraw until he had redeemed his stock by payment of the loan, or an unconditional tender. Anderson Building Loan Fund, etc. Assn. v. Thompson, 88 Ind. 405.

<sup>37</sup> Twin Creek & C. Turnpike R. Co. v. Lancaster (1883), 79 Ky. 552, and other cases cited *supra*, § 240.

<sup>38</sup> *Vide supra*, §§ 244, 245.

<sup>39</sup> New Era Life Assn. v. Rossiter (Pa. 1890), 19 Atl. Rep. 140; Morrison v. Dorsey, 48 Md. 461; Building Assn. v. Kribs, 7 Leg. & Ins. Rep. (Pa.) 21; McDonald v. Ross-Lewin (1883), 29 Hun, 87, where it was said that the issuance and acceptance of the certificate of membership furnished a sufficient consideration for his agreement to pay an assessment made during the time he should continue a member of the association. Where a corporation of which defendant was a member, organized for the purpose of raising and protecting live-stock, under a provision of the charter levied an assessment on his live-stock at its taxable value to meet expenses, which assessment was made *pro rata* on all the members, it was held that, after the expiration of the charter, the officers of the corporation, as trus-

But an assessment upon members of a mutual benefit society to pay for losses and expenses, part of which accrued before some of them became members, is void as to them unless their contract provides for the payment of all assessments levied after admission.<sup>40</sup> In mutual benefit associations payment of the full amount levied must be made in money and strictly in accordance with the contract.<sup>41</sup> A borrower from a building and loan society is still bound to pay his membership dues.<sup>42</sup>

**§ 1373. Extent of the power to assess.**—The directors of mutual benefit associations have no arbitrary discretion in the matter of assessments, and they can not be levied unless their necessity legally arises.<sup>43</sup> For the right to levy assessments or dues upon members is governed by the occasion for them.<sup>44</sup> And assessments must be made in strict conformity with the authority given in the charter and by-laws.<sup>45</sup> Thus an assessment to pay losses

tees, might recover the assessment to pay debts on showing that there were no other assets. *Guadalupe & S. A. R. Assn. v. West* (1888), 70 Tex. 391. In an action by a mutual life insurance company against a member for assessments, where the defendant denies having the policy when called upon to produce it, the entries in the company's books and the application for the policy, after the signature thereto has been verified by the defendant, are competent evidence of membership. Where that evidence is supplemented by proof that, while defendant was insured, deaths occurred among the members, for which he was assessed, and notice thereof was given him, it is proper, in the absence of any contradictory testimony, to instruct the jury to find for the plaintiff. *New Era Life Assn. v. Rossiter* (Pa. 1890), 19 Atl. Rep. 140. *Contra, In re Protection Life Ins. Co.*, 9 Biss. 188, and *Ancient Order v. Moore* (Ky. 1880), 9 Ins. L. J. 572, holding that the obligation to pay an assessment in a mutual benefit insurance society is wholly optional with the members, non-payment merely operating to sus-

pend the right to benefits. So, also, it is said of "whips," which are somewhat in the nature of assessments, being demands by the governing committees of clubs for contributions of a certain amount of money from each of the members, that they cannot be enforced by legal proceedings, response thereto being a voluntary matter with the club men. *Daly's Club Law* (2d ed. 1889), 37.

<sup>40</sup> *Insurance Co. v. Houghton*, 6 Gray, 77; *Roswell v. Equitable Aid Union*, 13 Fed. Rep. 840.

<sup>41</sup> *Manson v. Grand Lodge*, 30 Minn. 509; *Wiggin v. Knights of Pythias*, 31 Fed. Rep. 122; *Protection Life Ins. Co. v. Foote*, 79 Ill. 361; *Buffum v. Fayette Mut. Ins. Co.*, 3 Allen, 360; *Hoffman v. John Hancock, etc. Ins. Co.* (1875), 92 U. S. 161.

<sup>42</sup> *Everham v. Oriental, etc. Assn.*, 47 Pa. St. 352.

<sup>43</sup> *Thomas v. Whallon*, 31 Barb. 178; *Pacific Mutual Ins. Co. v. Guse* (1872), 49 Mo. 332.

<sup>44</sup> *Pulford v. Fire Dept.*, 31 Mich. 458; *Hibernia, etc. Co. v. Harrison*, 93 Pa. St. 264; *Rosenberger v. Washington Fire Ins. Co.*, 87 Pa. St. 207.

<sup>45</sup> *Agnew v. Ancient Order*, 1

and expenses, where the charter only authorizes an assessment to pay losses, is invalid.<sup>46</sup> And where a table of rates of assessment has been published by a society, and is made a part of the contract of insurance, the assessment must be in strict accordance therewith.<sup>47</sup> An assessment, however, made in good faith and upon correct principles and substantially correct, is binding.<sup>48</sup> Accordingly, an assessment by directors is not invalid, because of their interest therein as members of the society, nor because one director was absent when it was made;<sup>49</sup> nor because the board of directors might have successfully resisted the claim for which it was made, upon technical grounds.<sup>50</sup>

**§ 1374. In whom the power to assess is vested.**—Where all assessments are to be made by the board of directors, and the chairman must approve all proofs of death, when the secretary submits a notice of death to a meeting of the board it may direct the chairman to examine the proofs when they arrive, and if found correct the secretary to issue notices of assessment thereon.<sup>51</sup> But an assessment by a minority of the directors, is invalid, although the minority was a committee appointed by the majority to make the assessment.<sup>52</sup> And a vote to make an assessment, leaving the amount in blank, is invalid.<sup>53</sup> The receiver of a mutual benefit company, appointed in an action brought by the State to procure its dissolution, may assess the members for unassessed losses and bring separate actions against each member therefor.<sup>54</sup>

**§ 1375. Notice to members that payments required are due.**—A statutory direction to corporations to give notice of calls upon subscriptions does not apply to a building association, which has a regular stated system for the payment of dues at definite periods.<sup>55</sup> In beneficial associations, however, where the time and frequency of payments depend upon mortality of members, the giving of notice is a condition precedent to the payment of the

Mo. App. 254; Susquehanna Mut. Fire Ins. Co. v. Gackenbach, 115 Pa. St. 492 (1887).

<sup>46</sup> Bersch v. Sinnissippi Ins. Co., 82 Ind. 64.

<sup>47</sup> York County Mut. Aid, etc. Soc. v. Myers, 11 Week. Notes, 541.

<sup>48</sup> Marblehead Ins. Co. v. Underwood, 3 Gray, 210.

<sup>49</sup> Williams v. German Mut. Fire Ins. Co. (1873), 68 Ill. 387.

<sup>50</sup> Sands v. Hill, 42 Barb. 651.

<sup>51</sup> Passenger Conductors' Life Ins. Co. v. Birnbaum (1887), 116 Pa. St. 565.

<sup>52</sup> Monmouth, etc. Ins. Co. v. Lowell, 59 Me. 504. Cf. Farmers' Mut., etc. Fire Ins. Co. v. Chase, 56 N. H. 341 (1876).

<sup>53</sup> Mutual Ins. Co. v. Paige, 1 Hilt. (N. Y.) 430.

<sup>54</sup> McDonald v. Ross-Lewin, 29 Hun, 87 (1883).

<sup>55</sup> Morrison v. Dorsey, 48 Md. 461.

assessment.<sup>56</sup> And notice must be given whether required by the by-laws or not, to justify expulsion or forfeiture.<sup>57</sup> So that, although the assessment in a benefit association be properly levied, if no proper notice thereof be given, no forfeiture is incurred by failure to pay it.<sup>58</sup> In the absence of prescribed methods of notice, a personal service should be made.<sup>59</sup> Notice through the mails must be shown to have been placed in the post-office properly stamped and directed.<sup>60</sup> And where that kind of notice is provided the mailing is sufficient.<sup>61</sup> But where notice by mail is not especially provided for, proof that the notice was received must be made.<sup>62</sup> Where the notice of assessment directs the payment to be made by draft or post-office order, compliance with the direction is sufficient and sustains a plea of payment.<sup>63</sup>

**§ 1376. Penalty for non-payment of assessments and dues.**  
**Forfeitures.**—The penalty for non-payment of assessments and dues is usually a fine, or suspension from the benefits of membership, or expulsion.<sup>64</sup> Reasonable fines for delay in payment may

<sup>56</sup> Farrie v. Supreme Council, 47 Hun, 629 (1888); Hall v. Supreme Lodge, 24 Fed. Rep. 450; Agnew v. Ancient Order, 17 Mo. App. 254; Castner v. Farmers' Ins. Co., 50 Mich. 273 (1883); Bates v. Detroit Mut. Benefit, etc. Assn., 47 Mich. 646; Gellatly v. Minnesota, etc. Soc. (1880), 27 Minn. 215; Covenant Mut., etc. Assn. v. Spies, 114 Ill. 463 (1885).

<sup>57</sup> Wachtel v. Widows,' etc. Soc., 84 N. Y. 28; Fritz v. St. Stephen's Soc., 62 How. Pr. 69; Pulford v. Fire Dep't, 31 Mich. 458; People v. Benevolent Soc., 24 How. Pr. 216.

<sup>58</sup> Frey v. Mutual Ins. Co., 43 U. C. Q. B. 102.

<sup>59</sup> Wachtel v. Noah Widows,' etc. Soc. (1881), 84 N. Y. 28; Jones v. Sisson, 6 Gray, 288; York County Mut. Fire Ins. Co. v. Knight, 48 Me. 75 (1861); Williams. v. German Mut. Fire Ins. Co. (1873), 68 Ill. 387.

<sup>60</sup> Haskins v. Kentucky, etc. Soc., 8 Ky. L. Rep. 101; Garretson v. Equitable Mut., etc. Assn. (1888), 74 Iowa, 419.

<sup>61</sup> Lothrop v. Greenfield, etc. Ins. Co., 2 Allen, 82.

<sup>62</sup> McCorkle v. Texas Benevolent Assn. (1888), 71 Tex. 149; Durhaus v. Covey, 17 Mich. 282; Castner v. Farmers' Mut., etc. Co. (1883), 50 Mich. 273.

<sup>63</sup> Protective Life Ins. Co. v. Foote, 79 Ill. 361; Warnicke v. Noakes, 1 Peake, 67; Hawkins v. Rutt, 1 Peake, 186; Kington v. Kington, 11 M. & W. 233.

<sup>64</sup> *Vide supra*, §§ 541-551. Where the articles of a benefit society provide that "any member who shall refuse or neglect to pay all fines, dues, or contributions quarterly, and who, having been notified by the financial secretary of his indebtedness, shall still neglect or refuse, for sixty days after receiving said notice, to cancel his indebtedness, shall be dropped from the roll of membership," it has no right to drop a delinquent member from the rolls unless he has received notice of his delinquency. Evidence that the delinquent was absent at the time the notice was mailed to his residence, rebuts the presumption of its receipt by him which would ordinarily arise from the mailing

be imposed and will be enforced by a court of equity.<sup>65</sup> And the bringing of a suit by a building association against a member, does not relieve him from continuing his payments upon his stock, subject to the penalties resulting therefrom under the rules of the society.<sup>66</sup> In building societies there is a statutory lien on the shares of members for unpaid instalments and charges.<sup>67</sup> If fines are not effectual to secure prompt payment of the dues upon their stock, building societies may by rule establish a limit beyond which forfeiture of shares may be declared.<sup>68</sup> Forfeiture of stock in a building and loan association is necessarily forfeiture of membership, and *vice versa*; and the obligation to continue payment of dues is at an end.<sup>69</sup> In benefit associations it may be provided that for failure to pay an assessment for a certain time, a member's name shall be erased from the rolls and that he shall forfeit all claims upon the society.<sup>70</sup> Mutual benefit insurance societies may make provision for forfeiture of policies on non-payment of assessments.<sup>71</sup> But if not provided in the contract of insurance, forfeiture or suspension does not result.<sup>72</sup> In all cases the causes and

of a notice to his place of residence. *People v. Theatrical Mechanical Assn.* (1890), 8 N. Y. Supp. 675.

<sup>65</sup> *Shannon v. Howard, etc. Assn.*, 36 Md. 383; *Ocmulgee, etc. Assn. v. Thomson*, 52 Ga. 427; *Parker v. Butcher*, 16 L. J. Ch. 552; L. R. 3 Eq. 762; *McGannon v. Central Build. Assn.*, 19 W. Va. 726, holding that a fine of ten cents for failure to pay twenty-five cents was reasonable. *Contra, Mulloy v. Fifth Ward, etc. Assn.*, 2 MacArth. 594.

<sup>66</sup> *German, etc. Assn. v. Metzger*, 3 W. N. C. (Pa.) 204; *Union, etc. Assn. v. Masonic Hall Assn.*, 29 N. J. Eq. 389.

<sup>67</sup> *McGrath v. Hamilton, etc. Assn.*, 44 Pa. St. 383; *Watkins v. Workingmen's, etc. Assn.* (1881), 97 Pa. St. 514; *Hawkeye, etc. Assn. v. Blackburn*, 48 Iowa, 385. Cf. *Union Bank v. Laird*, 2 Wheat. 390; *Rogers v. Huntington Bank*, 13 Serg. & R. 77; *Grant v. Mechanics' Bank*, 15 Serg. & R. 140; *Sewall v. Lancaster Bank*, 17 Serg. & R. 285; *Utica Bank v. Smalley*,

2 Cow. 770; *Steamship Dock Co. v. Heron*, 52 Pa. St. 280.

<sup>68</sup> *Card v. Carr*, 1 C. B. (N. S.) 197.

<sup>69</sup> *McCahan v. Columbian, etc. Assn.*, 40 Md. 226; *Masonic Mutual, etc. Assn. v. Beck* (1881), 77 Ind. 203; *Joliffe v. Madison Mutual Ins. Co.* (1875), 39 Wis. 111; *Grand Lodge v. Cohn*, 20 Ill. App. 335; *Erdman v. Mutual Ins. Co.*, 44 Wis. 376; *Bailey v. Mutual Ben. Assn.* (Iowa, 1886), 27 N. W. Rep. 770.

<sup>70</sup> *Yoe v. Mutual Ben. Assn.*, 63 Md. 86; *Rood v. Railway Passenger, etc. Assn.* (1887), 31 Fed. Rep. 62; *American Mut. Aid Soc. v. Quire*, 8 Ky. L. J. 101; *Southern Mut., etc. Ins. Co.* (1881), 79 Ky. 404; *Benevolent Soc. v. Baldwin*, 86 Ill. 479; *Madeira v. Merchants', etc. Soc.*, 16 Fed. Rep. 749.

<sup>71</sup> *Madeira v. Merchants', etc. Soc.* (1883), 16 Fed. Rep. 749.

<sup>72</sup> *District Grand Lodge v. Cohn*, 20 Ill. App. 335; *Sanford v. California Ins. Assn.*, 63 Cal. 547; *Mutual Benefit Life Ins. Co. v. French*, 30 Ohio St. 240.

methods of forfeiture must be pointed out by by-law and strictly followed.<sup>73</sup> It can not be founded upon an omission for which another penalty is prescribed.<sup>74</sup>

**§ 1377. Waiver of penalty of forfeiture.**—Forfeiture does not take place until declared, against a member by the proper officers of the society, and grounds of forfeiture may be waived by them.<sup>75</sup> Receiving and retaining assessments is deemed to be a waiver of the right to forfeiture.<sup>76</sup> Thus, a member of a mutual aid society failed to pay his dues during a certain year; but the company, not discovering his failure, demanded and received subsequent dues, and retained them until after the death of the member; and it was held that the company had waived the forfeiture for non-payment, and was liable for the amount of the certificate.<sup>77</sup> And where a subordinate lodge sent to the grand lodge a member's assessment, who although he had not paid it, was not suspended for non-payment, as, under a by-law, he might have been, and he died without having paid the assessment, his death-benefit was due from the grand lodge.<sup>78</sup> Restoration of privileges after default is accorded with slight reference to formalities, all of which may be waived.<sup>79</sup>

**§ 1378. Practice in making assessments.**—As making assessments is a ministerial act, and every fact authorizing it must exist and every act required must be performed in order to subject a member to forfeiture of his rights for non-payment,<sup>80</sup> all such matters must be averred in pleading and proved at the trial. An averment that the assessment was duly made is insufficient.<sup>81</sup> And if an assessment is levied not in accordance with the constitution of

<sup>73</sup> *In re Butchers'* etc. Assn., 38 Pa. St. 298, 299; Commonwealth v. Pennsylvania, etc. Inst., 2 Serg. & R. 141; Commonwealth v. German Soc., 15 Pa. St. 251; Diligent Fire Co. v. Commonwealth, 75 Pa. St. 291.

<sup>74</sup> Wachtel v. Noah Widows' etc. Soc. (1881), 84 N. Y. 28.

<sup>75</sup> Watkins v. Workingmen's, etc. Assn., 97 Pa. St. 514; Rey v. Deyncourt, 4 Best & S. 820; North America, etc. Assn. v. Sutton, 35 Pa. St. 463; Moore v. Rawlins, 6 C. B. (N. S.) 289.

<sup>76</sup> Underwood v. Iowa Legion of Honor, 66 Iowa, 134; Gray v. National Ben. Assn., 111 Ind. 531;

Tobin v. Western Mut. Aid Soc. (1887), 72 Iowa, 261; Roswell v. Equitable Aid Union, 13 Fed. Rep. 840.

<sup>77</sup> Tobin v. Western Mut. Aid Soc. (1887), 72 Iowa, 261.

<sup>78</sup> Scheu v. Grand Lodge, 17 Fed. Rep. 214.

<sup>79</sup> Gaige v. Grand Lodge, 15 N. Y. St. Rep. 455; Manson v. Grand Lodge, 30 Minn. 509; Ingram v. Supreme Council (1888), 14 N. Y. St. Rep. 600.

<sup>80</sup> American Mut. Aid Soc. v. Helburn (1887), 85 Ky. 1.

<sup>81</sup> American Mut. Aid Soc. v. Helburn (1887), 85 Ky. 1; Mutual Ins. Co. v. Houghton, 6 Gray, 77.

a society but with a custom thereof, the custom must be shown to have been within the knowledge of the member.<sup>82</sup> It is frequently provided, however, that the records of a society shall be *prima facie* evidence of the occurrence of losses and of the legality of the assessment.<sup>83</sup>

**§ 1379. Fines.**—By-laws of a non-stock company may provide for imposing reasonable fines upon its members, for violation of its rules.<sup>84</sup> Such a by-law is void, if *ex post facto* or unreasonable, or if the fine is excessive.<sup>85</sup>

**§ 1380. Partnership liability of members.**—While for many purposes, as, for example, in respect of their rights *inter se*, the members of such associations are treated by the courts as partners,<sup>86</sup> their personal liability to creditors of the association depends, not upon the principles of partnership, but upon the law of agency. For, to constitute a partnership, strictly speaking, there must be a community of interest for business purposes. So that such associations, and clubs, for social and charitable purposes, and the like, are not properly partnerships, and their members neither possess the powers, nor share the responsibilities of partners.<sup>87</sup> Another ground of distinction can be seen to be this: If

<sup>82</sup> Underwood v. Iowa Legion of Honor, 66 Iowa, 134.

<sup>83</sup> People's Ins. Co. v. Allen, 10 Gray, 297; Susquehanna Mut. Fire Ins. Co. v. Gackenbach (1887), 115 Pa. St. 492; Williams v. German Mut. Fire Ins. Co. (1873), 68 Ill. 387.

<sup>84</sup> Hussey v. Gallagher, 61 Ga. 86, 49 Am. Dec. 604.

<sup>85</sup> Pulford v. Detroit Fire Dept., etc., 31 Mich. 458; Lynn v. Freemansburg, etc., 117 Pa. St. 1, 11 Atl. 537, 2 Am. St. Rep. 639.

<sup>86</sup> Thus where the articles of association had been disregarded, the court considered a mutual society for insurance of property as a general partnership, for the purpose of adjusting the rights of members against each other. Ellison v. Bignold, 2 Jac. & W. 503. In Brown v. Dale, 9 Ch. Div. 78, the "Fellowship of Fullers & Dyers" was treated as a partnership for the purpose of making a division of a fund among the members.

And a mutual marine insurance society has been treated as a partnership for the purpose of determining whether a member had been rightfully expelled or not. Wood v. Wood, L. R. 9 Exch. 190. "The law of unincorporated companies is composed of little less than the law of partnership modified and adapted to the wants of a large and fluctuating body." "Club Law," 27 Alb. L. J. 326; Leache's Club Cases, 9.

<sup>87</sup> Parsons on Partnership, 6, 36, 42, cited in Ash v. Guie, 97 Pa. St. 493, 39 Am. Rep. 818. "I had thought, but without much consideration, at the assizes, that these institutions were of such a nature as to come under the same view as a partnership, and that the same incidents might be extended to them; that where there was a body of gentlemen forming a club and meeting together for one common object, what one did in respect of the society bound the

a partner dies, the partnership is dissolved, but if a member of one of these associations dies, it has no effect on the association. They are therefore not to be judged, either as corporations, joint-stock associations or co-partnerships.<sup>88</sup> There is a case, however, in New York, in one of the lower courts, where a number of young gentlemen forming a club, were treated as a partnership to the fullest extent, and held liable for the debts of the club. The rule applicable was declared to be that of partnership, and each member liable until he gives public notice of withdrawal.<sup>89</sup> On the contrary, it has been held that the members of unincorporated associations are to be considered partners as to third persons.<sup>90</sup>

**§ 1381. Partnership liability.**—The liability of members of clubs and other such associations not being derived from the partnership relation, which for other purposes they may occupy one toward another, it follows that no liability attaches from the mere fact of membership.<sup>91</sup> For, as Lord St. Leonards remarked,

others, if he had been requested and consented to act for them. Trading associations stand on a different footing. Where persons engage in a community of profit and loss as partners, one partner has the right of property for the whole; so any of the partners has a right in any ordinary transaction, unless the contrary be clearly shown, to bind the partnership by a credit; he might accept a bill of exchange in the name of the firm, and as between the firm and strangers the partnership would be bound, although there might be an understanding in the firm that he was not to accept. . . . I apprehend that one of the members of this club could not bind another by accepting a bill of exchange, acting as a committee man, even where there might be an apparent necessity to accept, as in the case of a purchase of a pipe of wine; the party might draw the bill, but I do not think he could accept the bill to bind the members of the club." *Flemyng v. Hector* (1836), 2 Mees. & W. 172, 179, *per Lord Abinger*.

<sup>88</sup> *White v. Brownell*, 3 Abb. Pr. (N. S.) 325, 4 Abb. Pr. (N. S.)

189, 2 Daly, 355; *Olery v. Brown*, 5 How. Pr. 92. A hose company has been held not to be a partnership; and the court will not decree its dissolution and a division of its assets on the application of a minority. *Thomas v. Ellmaker*, 1 Parson's Sel. Cas. 98.

<sup>89</sup> *Park v. Spaulding* ("Worth, Club Case"), 10 Hun, 131; *Hirschl on Fraternal Societies*, 5.

<sup>90</sup> *Babb v. Reed* (1835), 5 Rawle, 151, 28 Am. Dec. 650.

<sup>91</sup> *Vide supra*, ch. VIII, §§ 126-140, PARTNERSHIP LIABILITY; *In re St. James Club*, 16 Jur. 1075; *Volger v. Ray* (1881), 131 Mass. 439; *Flemyng v. Hector*, 2 Mees. & W. 172; *Todd v. Emly*, 7 Mees. & W. 427; *Ash v. Guie*, 97 Pa. St. 493. "The determination of the controversy as to the liability of defendants, depends not at all upon the question whether they and the other associated individuals were partners as between themselves, nor upon the question whether as between all the associates and strangers they were such, but upon the law of agency." *Davison v. Holden* (1887), 55 Conn. 103, 3 Am. St. Rep. 40.

"if a member paying his annual subscription, and paying for the articles which he orders in the club, was also liable to pay the person who supplied the club with those articles, who would belong to a club?"<sup>92</sup> No individual member of a club, or committee of a club, is liable for goods supplied to the club, or for debts otherwise incurred by it, if he has not in some manner pledged his personal credit.<sup>93</sup> Thus, it has been held that the members of a theatrical club, were not liable on a rent contract made by some of their predecessors in the club, and that if they could be held at all, it would be only for use and occupation.<sup>94</sup> Nor are subscribers to a meeting-house fund, liable for work done by another subscriber, in the absence of an express agreement.<sup>95</sup> Where a tradesman receiving an order for goods signed "R. Stevens, solicitor to the club," examined a list of the members and finding, as he testified, such a list of eminent men figuring on the management committee, that he did not think that there was any reason to suppose that his bill would, under any circumstances, be allowed to go unpaid,—his testimony was held conclusive that he relied on the general respectability of the members, and it was decided that he could not single out any individual member to hold him liable for the debt.<sup>96</sup>

**§ 1382. Liability is dependent upon pledge of personal credit.**—To charge a member of such an association with individual liability he must be shown in some manner to have pledged his personal credit.<sup>97</sup> This he may do either immediately by his own contracts, orders, or representations,<sup>98</sup> or mediately through other persons acting as his agents. Thus, the members of

<sup>92</sup> *In re St. James Club*, 16 Jur. 1075.

<sup>93</sup> Daly's Club Law (2d ed. 1889), 40; *Jones v. Hope* (1880), 3 Times L. R. 247; *Flemyng v. Hector*, 2 Mees. & W. 172; *Todd v. Emly*, 7 Mees. & W. 427, 8 Mees. & W. 505. A member of a voluntary association is not liable for a debt incurred by a committee thereof if it does not appear that he was present at the meeting appointing the committee and there is no evidence of the authority of the committee to incur the debt. *Volger v. Ray* (1881), 131 Mass. 439.

<sup>94</sup> *Barry v. Nucolls*, 5 Humph. 326.

<sup>95</sup> *Cheeney v. Clark*, 3 Vt. 434. Cf. *Abbott v. Cobb*, 17 Vt. 597; *Robinson v. Robinson*, 10 Me. 240.

<sup>96</sup> *Overton v. Hewett*, 3 Times L. R. 246.

<sup>97</sup> *Todd v. Emly*, 7 Mees. & W. 427; *Jones v. Hope* (1880), 3 Times L. R. 247; *Flemyng v. Hector*, 2 Mees. & W. 172.

<sup>98</sup> *Ash v. Guie* (1881), 97 Pa. St. 493, where the officers of a Masonic lodge signing and affixing its seal for the first time to a pecuniary obligation, were held personally liable. "Persons contracting in the name of an association which is unincorporated are personally liable." *Lewis v. Tilton*, 64 Iowa, 220 (1884), 52 Am. Rep. 436.

such an association for educational purposes are personally liable for the salary of a teacher engaged by the acting president of the association.<sup>99</sup> "Tradesmen supplying goods to a club would look not to the servants or clerks who actually gave the orders, nor to private members of the club, but to those persons who, as active managing members, had held themselves out to the public as responsible."<sup>1</sup> The mere entry of the name of a member on the creditor's book, is not in itself sufficient evidence that it was he who gave the order, or is responsible for it; nor, on the other hand, is such entry conclusive against the creditor; for the creditor may have mistaken the person who gave the order as being the agent of one person when he was in fact the agent of another, and for this mistake, neither the creditor nor the former person should be made to suffer.<sup>2</sup>

**§ 1383. Degree of authorization which will fix liability.**—The degree of authorization which will suffice to fix liability on an individual member of a club or its committee, remains an open question at present.<sup>3</sup> In the older cases dealing with the pledging of personal credit, some action of a distinct and conscious character was held necessary on the part of the individual sought to be charged.<sup>4</sup> But as the law now appears to stand, it is of no legal significance that the defendants did not intend to be individually responsible, or that they did not know or believe that as a matter of law they would be.<sup>5</sup> Personal liability is incurred if there has been "authorization," either actual or constructive, involving in liability even a person who had no intention of pledging his personal credit, and who had but the slightest knowledge of the transaction.<sup>6</sup>

**§ 1384. General and special agency.**—In this connection it is important to bear in mind the distinction between general and special agents. When liabilities have been incurred by general agents, acting within the scope of their authority, all the members may be fairly presumed to have authorized or ratified such acts.<sup>7</sup> Thus, if the society, either by rule or custom, allows its officials or

<sup>99</sup> Heath v. Goslin (1884), 80 Mo. 310, 50 Am. Rep. 436.

<sup>4</sup> Daly's Club Law (2d ed. 1889), 56.

<sup>1</sup> Steele v. Gourley, 3 Times Law Rep. 118, *per* Day, J.

<sup>5</sup> Davison v. Holden (1887), 55 Conn. 103, 3 Am. St. Rep. 40.

<sup>2</sup> Daly's Club Law (2d ed. 1889), 41, citing Delaunay v. Strickland, 2 Starkie, 416.

<sup>6</sup> Daly's Club Law (2d ed. 1889), 57.

<sup>3</sup> Daly's Club Law (2d ed. 1889), 49.

<sup>7</sup> Davison v. Holden (1887), 55 Conn. 103, 3 Am. St. Rep. 40.

servants to incur debts, then all the members are personally liable, and of course where the entire organization is conducted on a credit principle, every member is liable.<sup>8</sup> But in the case of a special agent, or of a general agent exceeding the scope of his usual line of duty, only those members are liable who can be shown to have authorized or ratified his acts. Thus if the association works on a cash basis, then the mere fact of membership does not make one personally liable for its debts,<sup>9</sup> unless he can be shown to have advised, sanctioned or ratified the transaction.<sup>10</sup> So it has been held that personal liability attaches to the members of a fire-engine company who vote that one of their number shall see to fitting up their rooms,<sup>11</sup> to club-men who concurred in the purchase of plate,<sup>12</sup> to the members of a lyceum who voted for the appointment of a committee to purchase books,<sup>13</sup> to those members of a pigeon-breeding association who participated in a vote authorizing expenses to be incurred for the purpose of an exhibition, not specifically authorized by the constitution or by-laws of the club, and to those who assented to be bound by such vote.<sup>14</sup>

**§ 1385. Suits by or against unincorporated associations, in whose name to be brought.**—Suits by and against unincorporated associations can not at common law be brought and maintained in the name of the association, nor in the name of its agents

<sup>8</sup> Cockerell v. Ancompte, 2 Com. B. (N. S.) 445, n., 40 Eng. L. & Eq. 284. In Ash v. Guie (1881), 97 Pa. St. 493, 39 Am. Rep. 818, the members of a Masonic lodge, an unincorporated body, appointed a committee to erect a building for its use, authorizing them to borrow money for the purpose. Money was accordingly borrowed by the committee, who gave to the lenders certificates of indebtedness in the name of the lodge, signed by its officers, and sealed with the seal usually employed by the secretary for authenticating communications to other lodges, and which had never before been appended to a pecuniary obligation. In a suit on one of said certificates, wherein all the members were joined as defendants and alleged to be partners, it was held, first, that all the members were not so liable, but only the members of the committee or those

members of the lodge who participated in the erection of the building by voting for or advising it, and those members who in any way assented to the undertaking or subsequently ratified it, were alone liable for the amount of the certificate. Second, that the seal must be deemed as that only of the officers signing the certificate, and of those who advised the affixing of it thereto.

<sup>9</sup> Flemyng v. Hector, 2 Mees. & W. 172; Todd v. Emly, 7 Mees. & W. 427.

<sup>10</sup> Ash v. Guie (1881), 97 Pa. St. 493, 39 Am. Rep. 818; Feris v. Thaw (1880), 72 Mo. 446.

<sup>11</sup> Newell v. Bordin (1880), 128 Mass. 31.

<sup>12</sup> Delaunay v. Strickland, 2 Stark. N. P. 366.

<sup>13</sup> Ridgely v. Dobson, 3 Watts & S. 118.

<sup>14</sup> Ray v. Powers (1882), 134 Mass. 22.

or trustees.<sup>15</sup> As in case of partnerships consisting of numerous members, the action must in the first instance be instituted in the names of all the members.<sup>16</sup> Therefore an unincorporated lodge of free masons can not sue for the recovery of property of the lodge, but will be permitted to sue only as individuals.<sup>17</sup> So the members of an unincorporated association, formed with a view to pecuniary profit, should not sue as a corporation or society, but as partners.<sup>18</sup> So also unincorporated business associations are partnerships and each member is liable to the full extent of the partnership indebtedness, and all the members must be joined in a suit against the association.<sup>19</sup> And an action on a promissory note signed by the directors of such an association, should be in the names of all the members as defendants; but if the action is brought against the directors, the non-joinder of the members must be pleaded in abatement.<sup>20</sup> One, however, whose name is improperly signed to the articles of association, may be omitted as a defendant in an action against an association.<sup>21</sup> An association having made an unsuccessful attempt to incorporate, does business as a partnership.<sup>22</sup> By statute in Indiana a church organization can sue only in the name of wardens and vestrymen or trustees of the church.<sup>23</sup> And in Kentucky the trustees of an unincorporated religious society, in whom title is vested, may sue in their own names for the preservation of the property.<sup>24</sup> In that State, by another statute, a church may appoint and sue by a committee,<sup>25</sup> who need not be members of the church.<sup>26</sup> Where a law provides that a

<sup>15</sup> Curd v. Wallace, 7 Dana, 190, 32 Am. Dec. 85; Detroit Schuetzen Bund v. Detroit Agitations Verein, 44 Mich. 313, 38 Am. Rep. 270, holding that a court will not entertain a suit in the name of an unincorporated association, especially where it has been formed for the purpose of resisting the liquor laws of the state. Detroit Schuetzen Bund v. Detroit, etc. Verein, 44 Mich. 313.

<sup>16</sup> Curd v. Wallace, 7 Dana, 190, 32 Am. Dec. 85; Williams v. Bank of Michigan, 7 Wend. 542; Sullivan v. Campbell, 2 Hall, 271; Pipe v. Bateman, 1 Iowa, 369; Teed v. Elworthy, 14 East, 210.

<sup>17</sup> Lloyd v. Loaring, 6 Ves. Jr. 773; Fells v. Read, 3 Ves. Jr. 70; Smith v. Smith, 3 Desaus. 557.

<sup>18</sup> Pipe v. Bateman, 1 Iowa, 369.

<sup>19</sup> Williams v. Bank of Michigan, 7 Wend. 542; Wells v. Gates, 18 Barb. 554; Hess v. Werts, 4 Serg. & W. 356.

<sup>20</sup> McGreary v. Chandler, 58 Me. 537; Robinson v. Robinson, 10 Me. 240.

<sup>21</sup> Boyd v. Merrill, 52 Ill. 151.

<sup>22</sup> Coleman v. Coleman, 78 Ind. 344.

<sup>23</sup> Drumheller v. First, etc. church, 45 Ind. 275.

<sup>24</sup> Curd v. Wallace (1838), 7 Dana, 190, 32 Am. Dec. 85.

<sup>25</sup> Hadden v. Chorn, 8 B. Mon. 70.

<sup>26</sup> Humphrey v. Burnside, 4 Bush, 215, 224.

religious association by voluntarily associating and performing other acts, shall become a body corporate, the society by performing those acts obtains a corporate existence and may maintain suit in that capacity.<sup>27</sup> And a compromise of a suit brought by a majority of the members, is binding upon the minority.<sup>28</sup> Under a statute providing that such an unincorporated association may sue by its distinguishing name, a military company having such a name may sue by it.<sup>29</sup> None of these acts confers upon these officers, any right to sue, except in cases where the stockholders or associates could before have prosecuted.<sup>30</sup>

**§ 1386. Suits by members on behalf of the society.**—Although such an association can not sue in a corporate capacity, yet on the ground of their common interest, the members may sue in their own names on behalf of the society,<sup>31</sup> and on behalf of themselves and others having a like interest for purposes common and beneficial to all,<sup>32</sup> to protect the funds or property of the association,<sup>33</sup> especially where the parties are numerous;<sup>34</sup> the general rule being that where the members of an unincorporated association are too numerous to be joined in an action, or where the society is composed of very many members, one or more of them may sue on behalf of all the interested parties, but the representative capacity of the suing members must be distinctly stated in the declaration.<sup>35</sup> For, the mere fact that the society is unincorporated and its members numerous, will not warrant a suit by one member in behalf of the society, unless the nature and terms of his authority to bring suit appear in the complaint.<sup>36</sup>

**§ 1387. Suits by officers. At common law.**—Although one member of such an association may not in his own name sue for the benefit of all;<sup>37</sup> and although in general an unincorporated company can not at common law sue in the name of its trustees,<sup>38</sup>

<sup>27</sup> Shelburne, etc. Soc. v. Lake, 51 Vt. 353. '517; Wood v. Draper, 24 Barb. 187; Smith v. Lockwood, 1 Code Rep. (N. S.) 319; Birmingham v. Gallagher, 112 Mass. 190; Snow v. Wheeler, 113 Mass. 179; Pipe v. Batemar, 1 Iowa, 369; Marshall v. Lovelass, Cam. & N. 217; Lloyd v. Loaring, 6 Ves. 773.

<sup>28</sup> Horton v. Baptist Church, 34 Vt. 309.

<sup>29</sup> Fox v. Narramore, 36 Conn. 382.

<sup>30</sup> Corning v. Greene, 23 Barb. 33.

<sup>31</sup> Mears v. Moulton, 30 Md. 142.

<sup>32</sup> Beatty v. Kurtz, 2 Pet. 566.

<sup>33</sup> Lloyd v. Loaring, 6 Ves. 773; Mears v. Moulton, 30 Md. 142.

<sup>34</sup> Beatty v. Kurtz, 2 Pet. 566.

<sup>35</sup> Dennis v. Kennedy, 19 Barb.

<sup>36</sup> Habicht v. Pemberton, 4 Sandf. 657.

<sup>37</sup> Habicht v. Pemberton, 4 Sandf. 657.

<sup>38</sup> Niven v. Spickerman, 12 Johns. 401.

it may bring suit by its agents properly appointed.<sup>39</sup> For a plain equity principle allows a committee of an unincorporated society to sue and be sued as representatives of the whole.<sup>40</sup> And as religious societies have from the earliest times been invested as quasi-corporations with the right to acquire and hold property as a means of promoting their praiseworthy objects,<sup>41</sup> the trustees *de facto* of a religious society, whether it be incorporated or not, may maintain an action against a trespasser for an injury to a meeting house.<sup>42</sup> So also the regularly appointed committee of a voluntary religious society, who are in the actual possession of certain premises used as a church and burial ground, may file a bill to restrain the heirs of the donor from disturbing the possession.<sup>43</sup> And again, the holder of a check being the cashier of an unincorporated banking association, and holding it for the use of the concern, was allowed to recover upon it in his own name.<sup>44</sup> But it has been held that the treasurer of a voluntary association could not maintain a suit on a note given to the association and made payable to "the treasurer" thereof.<sup>45</sup> On the other hand, a Shaker community, whose property is held and whose contracts are made by trustees, may be held liable on their contracts in suits brought against the trustees; judgment rendered against the trustees in such suits may be satisfied by levy on the property of the community; and the writs, judgments and executions, may run against the trustees and their successors in their official capacity.<sup>46</sup>

**§ 1388. Statutory suits brought through officers.**—In some of the American States and in England there are statutes authorizing unincorporated societies to sue and be sued in the names of their officers, trustees, committees and the like.<sup>47</sup> Thus the code of New York provides that any unincorporated company or association composed of not less than seven persons, may sue and be sued in the name of its president or treasurer.<sup>48</sup> And an English

<sup>39</sup> *Habicht v. Pemberton*, 4 *Sandf.* 657.

<sup>46</sup> *Davis v. Bradford*, 58 N. H. 476.

<sup>40</sup> *Phipps v. Jones* (1853), 20 Pa. St. 260; *Cullen v. Queensberry*, 1 Bro. C. C. 101; *Cousins v. Smith*, 13 Ves. 544.

<sup>47</sup> *E. g.* 3 Geo. IV, ch. 126, § 74; N. Y. Code Civ. Proc., § 1919; 1 Chitty Pleading, 16, 17.

<sup>41</sup> *Burton's Appeal*, 57 Pa. St. 218.

<sup>48</sup> N. Y. Code Civ. Proc., § 1919;

<sup>42</sup> *Green v. Cady*, 9 Wend. 414.

*Tibbets v. Blood*, 21 Barb. 650; *Olery v. Brown*, 51 How. Pr. 92;

<sup>43</sup> *Beatty v. Kurtz*, 2 Pet. 566.

*Sewell v. Ives*, 61 How. Pr. 54;

<sup>44</sup> *O'Brien v. Smith*, 1 Blackf. 99.

*Poultnay v. Bachman*, 62 How. Pr.

<sup>45</sup> *Ewing v. Medlock*, 5 Port. (Ala.) 82.

466. An averment that the association consists of seven or more members is enough; their names

statute allows church-wardens to be sued in certain respects.<sup>49</sup> As these statutes give a right not existing at common law, in order that they may be effective they must be strictly pursued.<sup>50</sup> Accordingly, under a statute authorizing suit against the president or treasurer, an action is improperly brought, if instituted against the president, secretary and treasurer.<sup>51</sup> The liability of members of an unincorporated association, as partners, is preserved though not extended by these acts;<sup>52</sup> although an action can not be maintained against the individual members of the association, upon a debt due from the association, unless action was first brought against its president or treasurer.<sup>53</sup> These acts were intended to apply to suits having in view a remedy against the joint property and effects of such companies and associations, and when a suit is brought for an injunction, it is not well brought against the president of the association merely.<sup>54</sup> As they respect the remedy only, however, they are of local application, and as a joint-stock company of New York, which may be sued in the names of its officers, is not a corporation but a partnership, a member may be liable in another State as an individual partner.<sup>55</sup> The objection of a non-joinder of parties-defendant, is not available to the defendant association when sued by a firm, several members of which are also members of the association.<sup>56</sup>

**§ 1389. Suits by members against the society.**—Similar principles are followed in actions by members of unincorporated societies against such societies—as govern actions by stockholders against the corporation.<sup>57</sup> And, generally, courts will not inter-

need not be contained in the complaint. *Tibbets v. Blood*, 31 Barb. 650. The judgment and the execution are properly against the president as such, and they bind the joint property of the association, not the individual property of the president. *Schuylerville Bank v. Van Derwerker*, 74 N. Y. 231.

<sup>49</sup> *Doe v. Harpur*, 2 Dow. & Ry. 708.

<sup>50</sup> *Timms v. Williams*, 2 Gale & D. 621; *Hughes v. Thorpe*, 5 Mees. & W. 656, 667.

<sup>51</sup> *Schmidt v. Gunther*, 5 Daly, 452.

<sup>52</sup> *Kingsland v. Braisted*, 2 Lans. 17. Therefore where, without or-

ganization, articles of association or by-laws, a society is formed for social and recreative purposes, and a name is assumed by which liabilities are incurred, the members become jointly liable for any indebtedness incurred. *Park v. Spaulding*, 10 Hun, 128.

<sup>53</sup> *Flagg v. Swift*, 25 Hun, 623.

<sup>54</sup> *Rorke v. Russell*, 2 Lans. 244.

<sup>55</sup> *Boston, etc. R. Co. v. Pearson*, 128 Mass. 445. Cf. *Dinsmore v. Philadelphia, etc. R. Co.*, 11 Phila. 483; *Maltz v. American Express Co.*, 1 Flipp. 611.

<sup>56</sup> *Kingsland v. Braisted*, 2 Lans. 17.

<sup>57</sup> Thus building associations are not exceptions to the general law.

fere, until every means afforded by the society are exhausted.<sup>58</sup> Before it interferes with such associations the court must see that it is under obligation to act, and that it can affectually act for the benefit of those persons who have laid out their money in a way in which there must be difficulty in recovering it.<sup>59</sup> As a further illustration of this principle, where the property rights of an unincorporated church, or other association of persons for religious purposes are dependent on the questions of doctrine, discipline, ecclesiastical law, rule or custom, or church government, and question has been carried to and decided by the highest tribunal within the organization, the civil court will accept the decision as conclusive, and be governed by it in its application to the case before it.<sup>60</sup> The result then is, that the courts will not usually interfere for the purpose of protecting property rights of members of unincorporated associations, and when they do interfere the rules which the courts follow are essentially the same as those which guide them in dealing with formally incorporated bodies of the same kind.<sup>61</sup> And although the articles of association provide for the management of the society, yet any member may resort to the courts for redress, in case of fraudulent or wilful destruction of the joint property.<sup>62</sup> A court will not treat a private unincorporated association as a partnership, nor declare its dissolution and divide its assets among its members on the application of a minority.<sup>63</sup> Where there is nothing in the constitution of a joint-stock company, which regulates the remedies of shareholders as between themselves, the general law of partnership must govern, and a shareholder or his assignee can not maintain an action against the company, for goods furnished, until a final settlement of the partnership account and a balance struck.<sup>64</sup> Where there is a

governing corporations, that a stockholder cannot sue at law as a stockholder. *O'Rourke v. West Pennsylvania Loan, etc. Assn.*, 93 Pa. St. 308 (1880), 14 Phila. 145.

<sup>58</sup> *Chamberlain v. Lincoln*, 129 Mass. 70; *Lafond v. Deems*, 81 N. Y. 507; *Fischer v. Raab*, 57 How. Pr. 87; *Olery v. Brown*, 51 How. Pr. 92; *White v. Brownell*, 2 Daly, 329, 3 Abb. Pr. (N. S.) 318, 4 Abb. Pr. (N. S.) 162, 199.

<sup>59</sup> *Ellison v. Bignold*, 2 Jac. & W. 505.

<sup>60</sup> *Watson v. Jones*, 13 Wall. 679. And the decisions of the highest

tribunals of the order of Red Men have been held binding upon the courts. *Osceola Tribe v. Schmidt*, 57 Md. 98; *Anacostia, etc. v. Murbach*, 13 Md. 94; *Black v. Vandyke*, 2 Whart. 309.

<sup>61</sup> *Hirschl, Fraternities and Societies*, § 4711.

<sup>62</sup> *Dennis v. Kennedy*, 19 Barb. 517.

<sup>63</sup> *Thomas v. Ellmaker*, 1 Pars. Eq. Cas. 98. Cf. *Pipe v. Bateman*, 1 Iowa, 367.

<sup>64</sup> *Bullard v. Kinney*, 10 Cal. 60. Cf. *McMahon v. Rauhr*, 47 N. Y. 67.

statute making an officer of the company its representative, legal proceedings between the public officer and individual members are as unobjectionable as proceedings between incorporated companies and their shareholders.<sup>65</sup> Accordingly the society may be so sued by a member upon a contract made by the authorized agents of the society.<sup>66</sup> And a member of a joint-stock association may maintain an action against the association, or an officer thereof, to recover damages for maintaining a private nuisance.<sup>67</sup> Again, a bill filed in the name of a corporation, which consisted of nine trustees, against five of the trustees in their individual capacity, is maintainable.<sup>68</sup> Even at common law, a member of a mutual insurance association having suffered loss may sue the treasurer, secretary and seven members.<sup>69</sup> But an act allowing suits by a joint-stock company against any person, to be commenced in the name of the chairman, which it was also permissible to use in all cases where it before would have been necessary to state the names of the partners, was held not to authorize suit to be commenced by the chairman against one of the partners without making the other partners parties.<sup>70</sup>

**§ 1390. Suits by or against withdrawing members.**—As a general rule, members withdrawing from an unincorporated society, whether going singly or in numbers, have no rights in the property of the society. Thus the seceding members of a chartered society, forming a new private association, can not maintain a suit for the recovery of debts due the corporation.<sup>71</sup> And the title to the church property of a divided congregation, is in that part, though a minority, which adheres to the laws, usages and principles of the denomination under which the church was constituted.<sup>72</sup> But a contrary doctrine is held by the New York courts.<sup>73</sup> So also where a minority of an unincorporated lodge or

<sup>65</sup> Dicey on Parties, 156.

<sup>66</sup> Sawyer v. Methodist, etc. Soc., 10 Vt. 405.

<sup>67</sup> Saltsman v. Shults, '14 Hun, 256.

<sup>68</sup> Bethel v. Carmack, 2 Md. Ch. 143.

<sup>69</sup> Bromley v. Williams, 32 Beav. 177.

<sup>70</sup> McMahon v. Upton, 2 Sim. 473. See, also, Hichens v. Congreve, 4 Russ. 562.

<sup>71</sup> Smith v. Smith, 3 Desaus. 557.

<sup>72</sup> Schnorr's Appeal, 67 Pa. St.

138. *Vide infra*, § 1422; Roshe's Appeal, 69 Pa. St. 462; Harmon v. Dreber, 1 Speer, Eq. 87; Kniskern v. Lutheran Church, 1 Sandf. Ch. 439; Att'y-Gen. v. Pearson, 3 Mer. 353; Baker v. Fales, 16 Mass. 487; Stebbins v. Jennings, 10 Pick. 172.

<sup>73</sup> Petty v. Tooker, 21 N. Y. 267; Gram v. Prussia, etc. Soc., 36 N. Y. 161; Burrel v. Associate Reformed Church, 44 Barb. 282; Robertson v. Bullions, 11 N. Y. 243.

other society, withdraw from the grand lodge and surrender their charter, and the minority continue the organization under the old name, and have their own officers installed by the grand lodge, a court of equity will interfere to compel the withdrawing majority to turn over the lodge property to the remaining minority.<sup>74</sup> It is otherwise, however, where the charter had not been surrendered or declared forfeited by the supreme lodge.<sup>75</sup> Again, a departing member of a community of Shakers can not maintain a suit against the community, for wages.<sup>76</sup> And a member of a band, one of the by-laws of which provides that any member upon withdrawing shall leave all his interest with the band, who leaves it and takes his instrument with him, and refuses to give it up, may be sued—in trover to recover the instrument—by the remaining members.<sup>77</sup> But it has been held where the grand lodge of Odd Fellows revoked the charter of a certain lodge, and appointed the plaintiff as agent to receive from the subordinate lodge all the lodge property, that the subordinate lodge was not bound by the decree of the grand body; and that neither the agent appointed to receive, nor the grand lodge itself, had any right to the property of the subordinate lodge. And it was intimated that if the members of the subordinate lodge had subscribed to a constitution of the grand lodge as well as of the subordinate lodge requiring it, public policy would not admit of the parties binding themselves by such agreement.<sup>78</sup>

**§ 1391. Suits on subscriptions.**—A subscription to an association is merely voluntary until the society is formed, and those subscribers not consenting to the organization are not bound.<sup>79</sup> Accordingly a subscription for the purpose of ascertaining whether a sufficient amount could be raised to build and form a church, is not binding where the subscriber dies before the building-committee is chosen by the subscribers.<sup>80</sup> It seems, however, that if the association had been formed, and a contract for a lot or building entered into on the faith of the subscription, in the life-time of the subscriber, and with his express or implied consent, he, and of course his representatives, would have been bound to pay the sub-

<sup>74</sup> *Altmann v. Benz*, 27 N. J. Eq. 331.

<sup>75</sup> *Chamberlain v. Lincoln*, 129 Mass. 70.

<sup>76</sup> *Waite v. Merrill*, 4 Me. 102.

<sup>77</sup> *Danbury Cornet Band v. Bean*, 54 N. H. 524, as it was a

case of dissolution where a settlement had been reached.

<sup>78</sup> *Austin v. Searing*, 16 N. Y. 112; *Lamphere v. Grand Lodge*, 11 N. W. Rep. 268 (Mich. 1882).

<sup>79</sup> *Hedge's Appeal*, 63 Pa. St. 279.

<sup>80</sup> *Phipps v. Jones* (1853), 20 Pa. St. 260, 59 Am. Dec. 708.

scription.<sup>81</sup> A subscription to pay money to such persons as may be appointed trustees for the erection, is merely voluntary and without consideration; but if upon the faith of the subscription, trustees are afterward appointed and incorporated, and expenses incurred; of which the subscriber had knowledge, and to which he assented by paying part of the amount subscribed, the law will imply a promise to pay the remainder, and an action will lie by the corporation to recover it.<sup>82</sup> So also, generally, a contract of subscription for the purpose of building a church, the congregation having already been formed, and the promise being to pay the building-committee when appointed, may be enforced by the committee.<sup>83</sup> And again, the other members of a building-committee appointed by an unincorporated religious association to superintend the erection of a church, have been allowed to maintain an action to enforce a promise by one of their number to pay a certain amount toward the expenses of the edifice, although they had finished it and been discharged.<sup>84</sup> But if there is no express promise to pay trustees, the action must be brought in the names of all the other subscribers.<sup>85</sup> And it has been held that the treasurer of an unincorporated association can not maintain an action upon a subscription, although it be payable to the treasurer of the association.<sup>86</sup> The members of an association are liable for goods furnished their agent with their concurrence, but the party furnishing the goods can not sue upon the subscription of the members of the association.<sup>87</sup> A corporation formed from an association of individuals for business purposes, without the consent of a subscriber to the association, can not recover upon the subscription

<sup>81</sup> Phipps v. Jones (1853), 20 Pa. St. 260, 59 Am. Dec. 708.

<sup>82</sup> Farmington Academy v. Allen (1817), 14 Mass. 172, 7 Am. Dec. 201; Phillips Académie v. Davis, 11 Mass. 113, 6 Am. Dec. 192; Cross v. Jackson, 5 Hill, 478.

<sup>83</sup> Chambers v. Calhoun, 18 Pa. St. 13, 55 Am. Dec. 583. Even by the residue of that committee, the promisor being one of the committee.

<sup>84</sup> It was of no consequence that the congregation had appointed another committee to wait upon the promisor, for they could not transfer this *chase in action* to an-

other committee, so as to enable them to sue in their own names. Chambers v. Calhoun (1858), 18 Pa. St. 13, 55 Am. Dec. 583; Townsend v. Goewy, 19 Wend. 424.

<sup>85</sup> Cross v. Jackson, 5 Hill. 478.

<sup>86</sup> But that such an action might have been maintained if the subscription had been made payable to him by his individual name, and in that case the description of him as treasurer of the society would not affect the right. Ewing v. Medlock, 5 Port. 82.

<sup>87</sup> Ridgely v. Dobson, 3 Watts & S. 118.

for money laid out and expended by itself for the use of the defendant, as there is no privity between the parties.<sup>88</sup>

§ 1392. **Suits by members for "benefits."**—As a rule a member of a mutual benefit association can not seek redress in the courts for a violation of the obligations of the association concerning "benefits," until he has first exhausted the remedies provided by the rules of the association,<sup>89</sup> for it has been well said that mutual benefit societies never intended to be subject to petty and vexatious suits.<sup>90</sup> And where a benefit is payable "while so much remained in funds," a member can not maintain a suit in the courts for his benefit, as they would presume that the corporation had determined that there was not so much in the funds, and that determination would be conclusive upon the courts.<sup>91</sup> But a suit has been entertained against the order of Red Men for benefits.<sup>92</sup> And where an order or society has not provided a tribunal within the organization or association possessing conclusive jurisdiction, a member may sue at law for weekly benefits.<sup>93</sup> So also it has been decided that a member of the order of Chosen Friends may appeal to a court of law to enforce his rights in a benefit fund, even without first exhausting his remedies in the courts of the order, and this right can not be taken away from him by any provision in the constitution or by-laws of the order.<sup>94</sup> And again, where several men voluntarily associate themselves together for mutual insurance, and a loss occurs to a member of the association against which he is insured, he may bring suit against the society and ask that his loss be paid out of the funds of the association; and in case they are insufficient a ratable contribution may be required from all members of the organization.<sup>95</sup> Under statutes allowing actions against the society through its officers, a member of a benevolent society may maintain an action against the treasurer for such benefits.<sup>96</sup>

<sup>88</sup> Machias Hotel Co. v. Coyle, 35 Me. 405 (1853), 58 Am. Dec. 712, where the subscriber had not promised to pay the corporation anything.

<sup>89</sup> Poultney v. Bachman, 31 Hun, 49.

<sup>90</sup> Black v. Vandyke, 2 Mart. 309.

<sup>91</sup> Foram v. Howard Ben. Assn., 4 Pa. St. 519.

<sup>92</sup> Logan Tribe v. Schwartz, 19 Md. 565.

<sup>93</sup> Dolan v. Court Good Samaritan, 128 Mass. 437; Smith v. Society, 12 Phila. 380; Cartan v. Father Matthew, etc. Soc., 3 Daly, 20.

<sup>94</sup> Supreme Council v. Garrigus (1885), 104 Ind. 133; Bauer v. Samson Lodge, 102 Ind. 262.

<sup>95</sup> Bromley v. Williams, 32 Beav. 177.

<sup>96</sup> Poultney v. Bachman, 62 How. Pr. 466.

**§ 1393. Suits against members of unincorporated associations.**—The creditors of these associations may proceed either against the association or its members.<sup>97</sup> In New York, however, before the individual members of an unincorporated association, consisting of more than seven members, and having by-laws and a treasurer, can be sued for a debt of the association, an action must first be brought against the president or treasurer.<sup>98</sup> If the persons constituting an association send an agent into the market with unlimited authority to make purchases, and contract debts, in the name and for the benefit of the association, and not in the names of the individuals composing it, the creditor may, if he is content to look only to the property of the association as such for his security, institute his action against the association by its distinguishing name.<sup>99</sup> If he desires to reach the individual property of members, he must institute his suit against them and so many of them as he can name, as individuals. He may do this even if the sale was made and the credit given in form to the association, and the name of no individual member was then known to him, for the reason that he gave credit upon the request of a known agent for an unknown principal. By operation of law the credit was to the principal from the beginning, to be enforced whenever he can be discovered.<sup>1</sup> A suit may be instituted by the creditor against the individuals composing such an association,—as at common law, if the plaintiff will take the risk of naming all and naming them correctly.<sup>2</sup> If he names only a part of those who should be named, a plea in abatement may be interposed specifying omitted names.<sup>3</sup> But if no such plea be interposed, those who are named are properly sued and must submit to judgment.<sup>4</sup>

<sup>97</sup> Davison v. Holden (1887), 55 Conn. 103, 3 Am. St. Rep. 40, holding also that persons permitted under the Connecticut Act of 1875, to form voluntary associations for trading purposes, do not acquire corporate rights or immunity from individual liability; "Clubs and the Outside World" (1882), 17 L. J. 136; "Liabilities of Members of Clubs," 13 Leg. Obs. 481; "Partnership and Joint-stock Companies," 11 Jour. Jur. 233, 289.

<sup>98</sup> Flagg v. Swift, 25 Hun, 623; N. Y. Code, § 1919.

<sup>99</sup> Davison v. Holden (1887), 55 Conn. 103, 3 Am. St. Rep. 40. Cf. "Liabilities of Partners of Joint-stock Companies," 1 Scot. L. J. 78, 117 and 2 Scot. L. J. 1.

<sup>1</sup> Davison v. Holden (1887), 55 Conn. 103, 3 Am. St. Rep. 40. Cf. Monographic Note, 7 Am. St. Rep. 162.

<sup>2</sup> Davison v. Holden (1887), 55 Conn. 103, 3 Am. St. Rep. 40.

<sup>3</sup> Davison v. Holden (1887), 55 Conn. 103, 3 Am. St. Rep. 40.

<sup>4</sup> Davison v. Holden (1887), 55 Conn. 103, 3 Am. St. Rep. 40.

§ 1394. Actions to prevent illegal acts.—The remedies for fraudulent, illegal and *ultra vires* acts by the officers and managers of any of the unincorporated associations, are governed by the analogies of the law of corporations.<sup>5</sup> Thus a diversion of the funds from the objects designed, without the consent of the contributors, will be restrained.<sup>6</sup> And a fund raised by an association for a specific purpose can not be devoted by the members of the association to any other object while a single one objects. The diversion amounts to an *ultra vires* act and may be enjoined.<sup>7</sup> So also the members of a joint-stock company may bring actions to remedy the fraud of the trustees.<sup>8</sup> And again the trustees are liable in tort for their frauds on the company.<sup>9</sup> Furthermore, trustees receiving gifts are liable therefor to the company,<sup>10</sup> and they can not sell to the company.<sup>11</sup> The treasurer may be compelled to pay over funds belonging to the company.<sup>12</sup> And the treasurer of any such association for charitable purposes will be decreed to account for moneys in his hands, to pay them over according to the intention of the association.<sup>13</sup> While mere contributors to a fund creating a trust for mere charitable purposes, can not call the trustees to an account for a breach of trust, they may if they have an interest in the trust.<sup>14</sup> The members of such a company for profit, need not refund to the officers, debts paid by the latter, growing out of *ultra vires* acts.<sup>15</sup> For if a member has not participated or acquiesced in the *ultra vires* act, he is not liable thereon;<sup>16</sup> although the officers themselves are liable to third persons.<sup>17</sup> If the directors of a mutual insurance company misapply money specifically collected for the purpose of paying a certain policy-holder, the company is a necessary party to a suit by him against the directors.<sup>18</sup> Less than all the share-

<sup>5</sup> Waterbury v. Merchants' Union Ex. Co. (1867), 50 Barb. 157.

<sup>6</sup> Penfield v. Skinner, 11 Vt. 296; Morton v. Smith, 5 Bush, 467.

<sup>7</sup> Abels v. McKean (1867), 18 N. J. Eq. 462.

<sup>8</sup> In such proceedings the other members are not proper parties. Boody v. Drew (1874), 46 How. Pr. 459.

<sup>9</sup> Dennis v. Kennedy (1854), 19 Barb. 517.

<sup>10</sup> *In re Fry* (1860), 4 Phil. Rep. 129.

<sup>11</sup> Robbins v. Butler (1860), 24 Ill. 387.

<sup>12</sup> Sharp v. Warren (1818), 6 Price, 131.

<sup>13</sup> Penfield v. Skinner, 11 Vt. 296.

<sup>14</sup> Ludlum v. Higbee, 11 N. J. Eq. 342.

<sup>15</sup> Crum's Appeal (1878), 66 Pa. St. 474.

<sup>16</sup> Roberts' Appeal, 92 Pa. St. 407 (1880).

<sup>17</sup> Sullivan v. Campbell (1829), 2 Wall. 271.

<sup>18</sup> Brown v. Orr, 112 Pa. St. 233.

holders in a joint-stock company, may sue in behalf of themselves and other shareholders for the purpose of compelling the directors of the company to refund moneys improperly withdrawn by them from the company and applied to their own use; and to such a case an act of parliament providing that all suits by or on behalf of the company shall be prosecuted in the name of the chairman of the directors does not apply.<sup>19</sup> The bad faith or misconduct of some, or even all, of the trustees or managers of an association doing business as an express company, affords no ground for taking away the rights of the shareholders who constitute the company, either by dissolving it, or taking away its management, or placing it in the hands of an officer of the court. In such a case the principles of remedial or preventive justice go no further than to enjoin the misconduct, or remove the unfaithful officer.<sup>20</sup>

**§ 1395. Associations are either stock, or non-stock, companies.**—Membership in societies and companies not having capital stock and not organized with a view to pecuniary gain, carries with it certain rights and privileges peculiar to each association, and varying in each according to the purposes and objects of its organization.<sup>21</sup> These rights and privileges are set forth in the several charters or enabling acts under which the associations are formed, and in the constitutions and by-laws adopted in conformity therewith.<sup>22</sup> In New York there are two laws under which clubs, societies or associations may be formed, the Act of April 11th, 1865,<sup>23</sup> and the later Act of May 12th, 1875.<sup>24</sup> The latter act covers a greater variety of objects than the former; and it depends, therefore, upon the object and purposes for which the club or society is organized whether it should be incorporated under the one or the other.<sup>25</sup> The New

<sup>19</sup> *Hichens v. Congreve*, 4 Russ. 562.

<sup>20</sup> *Waterbury v. Merchants' Union Ex. Co.* (1867), 50 Barb. 157.

<sup>21</sup> *Vide supra*, § 18, STOCK AND NONSTOCK CORPORATIONS. As to the status of social clubs and the rights, duties and liabilities of members thereof, see "Club Law," 27 Alb. L. J. 326; also 5 Alb. L. J. 226; "Social Clubs" (1883), 10 Week. L. Bul. 365. As to the position of members and committee-

men, see 67 Law Times, 187. See the New York Acts of 1865, ch. 368; of 1874, ch. 35; of 1877, ch. 380; of 1873, ch. 698.

<sup>22</sup> *Belton v. Hatch* (1888), 109 N. Y. 593, 4 Am. St. Rep. 495.

<sup>23</sup> N. Y. Laws of 1865, ch. 368.

<sup>24</sup> N. Y. Laws of 1875, ch. 267.

<sup>25</sup> *Snyder's Club Law* (1889), 5. Societies for mutual benefit, benevolent, political, economic, patriotic, dramatic, historical, literary, library, artistic and bathing purposes, are to be organized and gov-

York statutes make especial provision for the organization and management of boards of trade<sup>26</sup> and political clubs.<sup>27</sup>

**§ 1396. Stock in unincorporated associations.**—Stock in an unincorporated association may cover chattels, money, or land. The owners of the stock own the land, but without power to compel a partition, or divert it from the use for which it was bought, unless a majority concur. Land so held may be converted into personality, as between the owners, if the change is convenient, and will promote any beneficial object. Such a conversion does not affect the nature of the property, but merely varies the relations of the parties *inter se.*<sup>28</sup>

#### A.

##### JOINT-STOCK COMPANIES.

**§ 1397. Joint-stock companies. Partnership liability. Distinguished from corporations.**—A joint-stock company resembles a corporation, but is in fact, and in law, a partnership. It has been defined as, “a partnership made up of many persons, acting under articles of association, for the purpose of carrying on a particular business, and of having its capital stock divided into shares, transferable at the pleasure of the holder.”<sup>29</sup> A joint-stock company is an unincorporated association, a partnership with resemblances to a corporation, wherefore it is sometimes called a *quasi* corporation.<sup>30</sup> Unless it is otherwise provided by statute, its members are subject to the rules governing partnership at the

erned under the Act of 1875, no provision for them having been made in the Act of 1865 (Snyder's Club Law, 1889), 5. Compare the first section of the Act of 1875 with the first section of the Act of 1865) while societies for social temperance, benefit (*query*, whether there be a distinction between “benefit” and “mutual benefit” societies under these acts), gymnastic, athletic, military drill, musical, yachting, hunting, fishing or bathing purposes, may be incorporated under either act. Snyder's Club Law (1889), 5.

<sup>26</sup> N. Y. Laws of 1877, ch. 228, as amended by N. Y. Laws of 1866, ch. 333. See further, “Boards

of Trade,” 2 Mitch. Mar. Reg. 721.

<sup>27</sup> N. Y. Laws of 1886, ch. 236.

<sup>28</sup> Crawford v. Gross, 140 Pa. St. 297, 21 Atl. 356.

<sup>29</sup> Att'y-Gen. v. Merc., etc. Ins. Co., 121 Mass. 524; Skillman v. Lockman, 23 Cal. 193; Gleason v. McKay, 134 Mass. 419; Belton v. Hatch, 109 N. Y. 593, 4 Am. St. Rep. 495; Lewis v. Tilton, 19 N. W. 911, 64 Iowa, 220, 52 Am. Rep. 436; Edwards v. Warren, etc. Co., 47 N. E. 502, 168 Mass. 564, 38 L. R. A. 791; Van Sandan v. Moore, 1 Russ. Ch. 441.

<sup>30</sup> Oak Ridge Coal Co. v. Rogers, 108 Pa. St. 147; People v. Coleman, 133 N. Y. 279, 27 N. E. 818, 16 L. R. A. 183.

common law.<sup>31</sup> It is created by contract of its members, independent of any State authority, even when organized under statutory provisions.<sup>32</sup> Any shareholder may transfer his stock regardless of consent of any other shareholder, or of the company.<sup>33</sup> The company is sued as a partnership, and each member is liable for the company's debts, when its property is exhausted.<sup>34</sup> The stockholders of a joint-stock company have no limited liability, the company can not sue or be sued in the name of the association.<sup>35</sup> The term "joint-stock company," is generally used in the law to designate only an unincorporated association.<sup>36</sup> A joint-stock company may be defined to be "a partnership whereof the capital is divided into shares which are transferable without the express consent of all the co-partners."<sup>37</sup> "A partnership with some of the powers and features of a corporation."<sup>38</sup> In this sense it is "an association of persons for purpose of profit, with capital divided into shares, transferable;"<sup>39</sup> a union of persons owning together a capital stock which they have devoted to a common purpose, under an organization analogous to that of a corporation; or a body upon which some of the privileges or powers of corporations have been conferred by statute, but which is not in a full sense a corporation.<sup>40</sup> It is therefore sometimes called a *quasi* corporation.<sup>41</sup> By reason of the close resemblances and many features common to a corporation, and a joint-stock company, courts have with difficulty distinguished between them, and sometime have varied in opinion with which to class particular associations.<sup>42</sup> The words "corporation" in constitutions and stat-

<sup>31</sup> Hedge's Appeal, 63 Pa. St. 373, 84 Pa. St. 359; People v. Coleman, 133 N. Y. 279, 16 L. R. A. 183; Frost v. Walker, 60 Me. 468; Batty v. Adams Co., 16 Neb. 44; Clagett v. Kilbourne, 1 Black (U. S.), 346.

<sup>32</sup> People v. Coleman, 133 N. Y. 279, 16 L. R. A. 183.

<sup>33</sup> Willis v. Chapman, 68 Vt. 459, 35 Atl. 459.

<sup>34</sup> Butterfield v. Beardsley, 28 Mich. 412; Taft v. Ward, 106 Mass. 518.

<sup>35</sup> Cox v. Bodfish (1853), 35 Me. 302.

<sup>36</sup> Att'y-Gen. v. Mercantile, etc. Co., 121 Mass. 524.

<sup>37</sup> Hedge's Appeal, 63 Pa. St. 273 (1869); *Vide supra*, § 6a, JOINT-STOCK COMPANIES.

<sup>38</sup> People v. Coleman, 133 N. Y. 279, 16 L. R. A. 183.

<sup>39</sup> Phillips v. Blatchford, 137 Mass. 510; Gibb's Estate, 157 Pa. St. 59, 27 Atl. 383; Att'y-Gen. v. Mercantile, etc. Co., 121 Mass. 524.

<sup>40</sup> 2 Addison Cont. (Abb. & Wood's ed.), p. 105, note.

<sup>41</sup> Oak Ridge Coal Co. v. Rodgers, 108 Pa. St. 147.

<sup>42</sup> People v. Coleman, 133 N. Y. 279, 16 L. R. A. 183; Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566; Warner v. Beers, 23 Wend. (N. Y.) 103.

utes will not include an unincorporated joint-stock company.<sup>43</sup> Whether or not an association is a corporation depends upon what powers and faculties have been granted to it by the legislature, regardless of whether it used the word corporation, or expressed any intention to make it a corporation.<sup>44</sup> Its articles of association bear the same relation to it, that the charter bears to an incorporated company, regulating the duties of the officer, and the duties and obligations of the members among themselves.<sup>45</sup> At common law they have none of the rights and immunities of regularly incorporated companies, being nothing more than partnerships; and every member of the company is liable for the debts of the concern, no matter what the private arrangements among themselves may be.<sup>46</sup> But both in England and in this country, the law of joint-stock companies is largely regulated by statute.<sup>47</sup> The powers, conferred upon them by these enactments, are such that for many purposes they are held to be corporations,<sup>48</sup>—even though they have nowhere been designated as such,

<sup>43</sup> Thomas v. Dakin, 10 Wend. (N. Y.) 9; Oliver v. Liverpool, etc. Co., 100 Mass. 531.

<sup>44</sup> People v. Assessors, etc., 1 Hill (N. Y.), 616; Fargo v. Louisville, etc. Co., 6 Fed. 787; Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566.

<sup>45</sup> Bray v. Farwell (1880), 81 N. Y. 600.

<sup>46</sup> Robbins v. Butler (1866), 24 Ill. 387, 426, 432; Moore v. Brink, 4 Hun, 402; Wells v. Gates, 18 Barb. 554; Skinner v. Dayton (1822), 19 Johns. 513; Keasley v. Codd (1826), 2 Carr. & P. 408.

<sup>47</sup> N. Y. Laws of 1881, ch. 599; of 1868, ch. 290; of 1867, ch. 289; of 1858, ch. 172; of 1854, ch. 245. "In 1856, the 19 & 20 Vic. c. 47, was passed under the auspices of Mr. Lowe as vice-president of the Board of Trade, consolidating the various provisions of the numerous preceding Joint-Stock Companies Act. This act, however, was itself soon amended and varied by the 20 & 21 Vic. cc. 90 & 91. A new act, sweeping away the former enactments and creating a complete body of law in

their place, was accordingly passed in 1862, and this, the 25 & 26 Vic. c. 89, now contains the great body of law on the subject. It is supplemented by the Industrial Societies Act, 1862, 25 & 26 Vic. c. 87, containing very similar provision, with some additional privileges, for the regulation of industrial and provident societies by the 28 & 29 Vic. c. 86, extending the principle of limited liability to persons advancing money to private and unregistered partnerships, and by the Companies Act, 1867, 30 & 31 Vic. c. 131, introducing additional provisions for the security of creditors and shareholders, intended to remedy the evils in the constitution and management of joint-stock companies brought to light in the panic of 1866, and to incorporate the suggestions of a committee of the House of Commons appointed in consequence of that panic." Shelford on Joint-Stock Companies, 7, 8.

<sup>48</sup> Thomas v. Dakin, 22 Wend. 9; Warner v. Beers, 23 Wend. 103; Leavitt v. Blatchford, 17 N. Y.

and though the statutes relating to joint-stock companies do not so designate them,<sup>49</sup> or have expressly declared that they shall not be so considered.<sup>50</sup> But with respect to the personal liability of members to creditors of the company, they are still subject to the common law rules applicable to partnerships.<sup>51</sup> A distinction between a joint-stock society, and a joint-stock corporation, is that in the former it is the trustees who are usually incorporated, while in the case of a joint-stock corporation it is the shareholders who are incorporated. The motive of forming the joint-stock association, is to change the manner of holding property, so that it may be held by joint-tenancy, as in partnerships; (whereas the members of an ordinary association hold its property as tenants-in-common,)—the members of a corporation are neither legal or equitable owners of the corporate property.<sup>52</sup> Among the

521, 5 Barb. 9; Gillett v. Phillips. 13 N. Y. 114; Talmage v. Pell, 7 N. Y. 328; Gillett v. Moody, 3 N. Y. 478; Gifford v. Livingston, 2 Denio, 380; Case v. Mechanics' Banking Assn., 1 Sandf. 693; Culver v. Sanford, 8 Barb. 225; Tracy v. Talmage, 18 Barb. 456; Falconer v. Campbell, 2 McLean, 195; Parmly v. Tenth Ward Bank, 3 Edw. 395; Bank of Watertown v. Watertown, 25 Wend. 686; *In re* Bank of Dansville, 6 Hill, 370; People v. Niagara, 4 Hill, 20; Willoughby v. Comstock, 3 Hill, 389; People v. Watertown, 1 Hill, 616; Leavitt v. Yates, 4 Edw. 134; Leavitt v. Tyler, 1 Sandf. Ch. 207; Boisgerard v. New York Banking Co., 2 Sandf. Ch. 231. "Joint-stock companies may be said to be partnerships, or individuals associated for some specific purpose under a designated name or description, to which, by some general or special statute, when they have been formed or composed in a specified manner, some of the powers or proper attributes of a corporation are given." Dayton, etc. R. Co. v. Hatch (1855), 1 Disn. 84, 90.

<sup>49</sup> People v. Wemple (1889), 52 Hun, 434.

<sup>50</sup> Fargo v. Louisville, N. A. & C. Ry. Co. (1881), 6 Fed. Rep. 787;

Sanford v. Board of Supervisors (1858), 15 How. Pr. 172; Waterbury v. Merchants' Union Express Co. (1867), 50 Barb. 157. The legislative intent in so declaring being merely to prevent the limited liability of members incident to corporate existence. Oliver v. Liverpool, etc. Ins. Co. (1868), 100 Mass. 531, 539.

<sup>51</sup> Westcott v. Fargo, 61 N. Y. 542; Witherhead v. Allen (1867), 3 Keyes, 562; Cross v. Jackson (1843), 5 Hill, 478; Wells v. Gates (1854), 18 Barb. 554; Skinner v. Dayton (1822), 19 Johns. 513; Boston & Albany R. Co. v. Pearson (1880), 128 Mass. 445; Taft v. Ward (1873), 111 Mass. 518; Taft v. Ward, 106 Mass. 518; Oliver v. Liverpool & London L. & F. Ins. Co. (1868), 100 Mass. 531; Bodwell v. Eastman (1871), 106 Mass. 525; Frost v. Walker (1872), 60 Me. 468; Cutter v. Estate of Thomas (1852), 25 Vt. 73; Kramer v. Arthurs (1847), 7 Pa. St. 165; Tappan v. Bailey (1842), 45 Mass. 529. *Contra*, Townsend v. Geowey (1838), 19 Wend. 423; Ridenour v. Mayo (1883), 40 Ohio St. 9; Irvine v. Forbes (1852), 11 Barb. 587.

<sup>52</sup> Livingston v. Lynch, 4 Johns. Ch. 573.

distinguishing features, unless varied by statute, a joint-stock company requires no statutory authority. It may be formed by contract between its members and is valid at common law.<sup>53</sup> It is not dissolved by the death or withdrawal of a member.<sup>54</sup> It may be dissolved any time by mutual consent of its members and without the consent of the State.<sup>55</sup> Its use of a common name does not make it a corporation,<sup>56</sup> nor does the fact, that no individual member has any authority to bind it,<sup>57</sup> or that its capital stock is divided into shares and that they are transferable by the owners, make it a corporation;<sup>58</sup> all its members are individually liable for the contracts of any of its authorized officers or agents.<sup>59</sup> It cannot by its assumed name take, hold, or convey property. That must be taken and conveyed by some officer or agent in trust for its members, and the title vests in the named grantees, as tenants in common or as trustees, for the individuals designated as beneficiaries.<sup>60</sup> An action can not be brought by or against it in its assumed name, but in the name of all the associates jointly as individuals, for they are all necessary parties.<sup>61</sup> A joint-stock company, though neither a corporation, nor a partnership, partakes of the features of both. Though its capital is divided into transferable shares of stock, and it is governed by articles of association,—its members are, nevertheless, liable as partners to the company's creditors.<sup>62</sup> In Illinois it is a statutory crime for individuals, or an unincorporated association, to use a name which implies incorporation.<sup>63</sup> The attachment laws, authorizing attachment of shares of stock, do not apply to clubs, joint-stock companies, or other unincorporated associations.<sup>64</sup> A club is not a partnership. Though its members may be liable as partners,—no member has power to contract for the association.<sup>65</sup>

<sup>53</sup> *In re Aston*, 127 Beav. 480; *Phillips v. Blatchford*, 137 Mass. 510.

<sup>54</sup> *Gleason v. McKay*, 134 Mass. 419.

<sup>55</sup> *Lake v. Munford*, 4 Smedes & M. (Miss.) 312.

<sup>56</sup> *Oak Ridge Coal Co. v. Rodgers*, 108 Pa. St. 147.

<sup>57</sup> *Warner v. Beers*, 23 Wend. (N. Y.) 103.

<sup>58</sup> *Phillips v. Blatchford*, 137 Mass. 510.

<sup>59</sup> *Frost v. Walker*, 60 Me. 468.

<sup>60</sup> *Byam v. Bickford*, 140 Mass. 31, 2 N. E. 687.

<sup>61</sup> *Van Aernam v. Bleistein*, 102 N. Y. 355.

<sup>62</sup> *Kossakowski v. People* (1899), 177 Ill. 563, 53 N. E. 115.

<sup>63</sup> *Hamilton Boiler Co. v. Hazelton, etc. Co.* (1892), 142 Ill. 494.

<sup>64</sup> *Lyon v. Denison* (1890), 80 Mich. 371, 45 N. W. 358, 8 L. R. A. 358.

<sup>65</sup> *Lumbard v. Grant* (1901), 35 N. Y. Misc. Rep. 140.

## B.

## LIMITED PARTNERSHIPS.

**§ 1398. Limited partnerships.**—A limited partnership occupies a middle-ground between ordinary partnerships and corporations. The nature and extent of the liability attaching to its members, is to be determined by reference to the statute under which it was organized, and persons dealing with it are bound by the limitations fixed therein.<sup>66</sup> Thus where a statute provided that no liability for an amount exceeding five hundred dollars, except against the person incurring it, should bind such an association, unless reduced to writing and signed by at least two of the managers of the concern,<sup>67</sup>—a person entering into a contract with it involving a greater amount but signed by only one of the managers has no remedy either at law<sup>68</sup> or in equity,<sup>69</sup> the statutory provisions being equally binding upon courts of equity and law.<sup>70</sup> The association is not bound by the admissions or declarations of the manager, unless made by him as agent of the association. The use of the abbreviation “Ltd.”, instead of “limited” after the name of the corporation, will not make the person so signing, a general partner. Omission to use the word “limited,” after the company’s name, affects only the person so using it, or participating in the omission.<sup>71</sup>

## C.

## CAR-TRUST ASSOCIATIONS.

**§ 1399. Car trust associations.**—A “Car Trust” is an owner or an association of owners or manufacturers, of railroad cars, who sell them upon the instalment plan, through an agent or trustee, who issues to the members of the trust-association, certificates representing their several interests in the payable instalments. “The Car Trust associations are not corporations, or partner-

<sup>66</sup> Andrews Brothers Co. v. Youngstown Coke Co., Limited (1889), 39 Fed. Rep. 353; Melting Co. v. Reese, 118 Pa. St. 355; Pearce v. Madison, etc. R. Co., 21 How. 443.

<sup>67</sup> Pa. Act of June 2, 1874, § 5.

<sup>68</sup> Melting Co. v. Reese, 118 Pa. St. 355.

<sup>69</sup> Andrews Brothers Co. v. Youngstown Coke Co. (1889), 39

Fed. Rep. 353, holding that a court of equity will not decree a reformation of the instrument so that it may appear to be executed by the requisite number of defendant’s managers.

<sup>70</sup> Litchfield v. Ballou, 114 U. S. 190.

<sup>71</sup> Abington Dairy Co. v. Railroads (Pa. 1904), 24 Pa. Super. Ct. 632.

ships, nor legal entities of any description, but are simply car-trust certificates in the hands of various persons.<sup>72</sup> Such a company can not lease its whole plant to another corporation.<sup>73</sup> A car-lease of rolling-stock made to railroads, providing that upon the payment of certain rentals the title shall pass to the railroad company, is held to be a conditional sale. Though a lease in form, it is in substance a contract of purchase, with title reserved in the vendor, until the payment of certain annual sums called rents, and with the right to retake possession, on default in payment.<sup>74</sup> When a car-manufacturing corporation leases all its property to another corporation for a term, and agrees during that term that it will not engage in the car-manufacturing business, this is in unreasonable restraint of trade and therefore void.<sup>75</sup> A contract of sale of rolling stock to a railroad such as is usually made by a car trust, payable by instalment, conditioned that the title shall remain in the vendor until the purchase price is fully paid is generally held to be not an absolute sale but a conditional sale, with chattel mortgage right in the vendor. For vendor's complete protection against its creditors, it should record the contract.<sup>76</sup> A car trust is an association of persons formed, under an instrument in writing, for the purpose of buying, selling and leasing railroad rolling stock.<sup>77</sup> The essential features of the New England Car Trust, as stated in a leading Massachusetts case, may be taken as illustrating the nature of these organizations. In that case "the members of the car trust were to furnish money for the purchase of the rolling stock, and were to have certificates for the amounts so furnished, provided that the principal sum contributed by each member should be repaid in ten annual instal-

<sup>72</sup> McGourkey v. Toledo, etc. Ry. (1892), 146 U. S. 536.

<sup>73</sup> Central T. Co. v. Pullman, etc. Co. (1891), 139 U. S. 24, 171 U. S. 138 (1898).

<sup>74</sup> Kneeland v. American, etc. Co. (1890), 136 U. S. 89.

<sup>75</sup> Central Transp. Co. v. Pullman P. C. Co. (1891), 139 U. S. 24; Alger v. Thacher (1837), 36 Mass. 51.

<sup>76</sup> General, etc. Co. v. Transit, etc. Co. (1898), 57 N. J. Eq. 460, 42 Atl. 101.

<sup>77</sup> Ricker v. American Loan & Trust Co. (1885), 140 Mass. 346,

347, *per* C. Allen, J. "Car Trust Securities," by Francis Rawle (1885), 8 Am. Bar Assn. Rep. 277. The questions relating to car trusts generally involve the validity of the conditional contract of lease under which the rolling stock is supplied to the railway companies as against the mortgagees of the latter; and will be treated in a subsequent chapter. Cf. Central Trust Co. v. Ohio Central R. Co., 36 Fed. Rep. 520; Farmers' Loan & Trust Co. v. Chicago & A. Ry. Co. (1889), 8 Ry. & Corp. L. J. 184.

ments, with interest; both principal and interest being payable only out of the rentals received for the rolling stock. Instead of the lease being made to the railroad company directly by the car trust, a plan was adopted by which the car trust delivered the property to the American Loan and Trust Company, as trustee, which trustee issued the certificates to the members of the car trust, and also executed the leases to the railroad company, with provisions for a rental sufficient to meet the above payments of principal and interest, in addition to the expenses, including the taxes. In this manner, the railroad company became bound by its covenants in the leases to make payments, which in the course of ten years would pay in full for the rolling-stock, so that the rolling-stock would become the property of the railroad company at the end of that time. All contracts relating to any business of the car trust, involving liabilities for the payment of money, were to be in writing and made under the direction of the board of managers. The original board of managers was named in the articles of association, but the shareholders were to have power to remove them and to elect others. At all meetings every shareholder was to have one vote for each share of stock owned by him, and provision was made for the transfer of shares, and the association was not to be dissolved by the death of members. Every owner, of one or more shares, was to be entitled to a proportionate share of the rentals received. The contemplated profits were limited to six per cent. interest on the money advanced. The losses, if any, must be borne proportionally. This constituted a partnership. There were provisions looking to the purchase of rolling-stock from time to time, and to issue of new certificates to those who should advance the money on the occasion of each purchase, and to the making of a new and separate lease of each lot or series of rolling-stock. As such new certificates might be issued to different persons from those who contributed money for the first purchase, it would seem that the holders of each series, or separate issue of shares, would constitute a partnership by themselves, under the same general provisions and management.”<sup>78</sup> A car trust association is not a corporation. It is a mere association of persons; and in States such as Massachusetts,—where no intermediate form of organization between a corporation and a partnership, like the joint-stock companies of

<sup>78</sup> C. Allen, J., in *Ricker v.* (1885), 140 Mass. 346, 347, 348, American Loan & Trust Co. 5 N. E. 284.

England and some of the United States, are known and recognized,—its members must be treated as partners.<sup>79</sup> They can not be regarded as simply co-owners.<sup>80</sup> Yet it is to be distinguished from a partnership—in that any member may transfer his shares at pleasure, without the consent of the other members, and in that it is not dissolved by the death or withdrawal of any member.<sup>81</sup> The members of an unincorporated railway construction and equipment company can not be held bound upon a contract entered into by its trustees beyond the purposes for which the company was organized,<sup>82</sup> and the fact that a number of the members have entered into an agreement to authorize the trustees to make a contract of that character does not render them liable upon the contract unless all the members have joined in the authorization. All the members must be individually bound, or none.<sup>83</sup>

*In case of a "Car-Trust" lease, of rolling-stock, with delivery of possession made on contract of sale where rental paid shall equal the purchase price, the courts favor the construction of the transaction as a conditional sale, rather than a chattel-mortgage, and that the vendor is protected against judgment creditors and mortgagees of the railroad corporation.<sup>84</sup> A car-trust is described as a private association of persons for the purpose of dealing in railroad-rolling stock, to be leased or sold on the instalment plan, the members of the association holding certificates or mortgage bonds representing their several investments and entitling them to proportional division of the rentals.<sup>85</sup>*

## D.

### PRESS ASSOCIATIONS.

**§ 1400. Press associations.**—In the absence of any obligation by its contract, the Associated Press can not be compelled to

<sup>79</sup> Ricker v. American Loan & Trust Co. (1885), 140 Mass. 346, 5 N. E. 284, holding the property of a car trust to be taxable as the personal property of a partnership "in the place where their business is carried on," under Mass. Pub. Stat. ch. 11, § 24.

<sup>80</sup> Ricker v. American Loan & Trust Co. (1885), 140 Mass. 346, 349, 5 N. E. 284.

<sup>81</sup> 2 Lindley on Partnership (Ewell's ed.), 1085.

<sup>82</sup> Roberts' Appeal (1880), 92 Pa. St. 407, 423.

<sup>83</sup> Roberts' Appéal (1880), 92 Pa. St. 407, 423.

<sup>84</sup> General, etc. Co. v. Transit, etc. Co. (1898), 57 N. J. Eq. 460, 42 Atl. 101.

<sup>85</sup> McGourkey v. Toledo, etc. Ry. (1892), 146 U. S. 536.

furnish news to a newspaper corporation.<sup>86</sup> But an incorporated press association in Illinois, as a *quasi-public* corporation, must furnish news alike to all its patrons, and may be enjoined from refusing to furnish news to a patron, taking news from a competing corporation. A by-law of such an association providing that its patrons shall not take news from any of its competitors, is contrary to public policy, as in restraint of trade, and consequently is illegal and void.<sup>87</sup>

## E.

### MINING COMPANIES.

**§ 1401. "Cost-book" mining companies. Management.**  
**Transfer of shares.**—Among the associations recognized by the law, are mining partnerships. They are governed by rules peculiar to themselves, and differ from ordinary trading partnerships. They exist in all mining communities, as distinct associations, with peculiar rights and liabilities, different from those governing ordinary trading partnerships. One rule is that one person may convey his interest in the mine, without dissolving the partnership. The successful development of a mine requires its continuous working, which would be impracticable by an association liable to be dissolved by the death or bankruptcy of a member, or by the assignment of his interest.<sup>88</sup> Mining companies, or "cost-book companies," as they are called in England, were first heard of there in 1850, in the mines of Cornwall and Devonshire.

*They differ from ordinary partnerships* in that a member has a right to transfer his interest in the mine at any time, and the transferee may become a member of the association, without the consent and even against the wishes of the other partners; neither does the transfer dissolve the partnership so as to compel a winding up of its affairs.<sup>89</sup> They are governed by many of the rules relating to ordinary partnerships, but also by some rules pe-

<sup>86</sup> *State v. Associated Press* 23 S. 641; *Skillman v. Lackman*, 23 Cal. 199; *Duryea v. Burt*, 28 Cal. 569; *Bissell v. Foss*, 114 U. S. 252; *Taylor v. Castle*, 342 Cal. 367; *Settembre v. Putnam*, 30 Cal. 490.

<sup>87</sup> *Inter Ocean Co. v. Associated Press* (1900), 184 Ill. 438, 56 N. E. 822, 48 L. R. A. 568, 75 Am. St. Rep. 184.

<sup>88</sup> *Kahn v. Smelting Co.*, 102 U.

S. 261.

cular to themselves.<sup>90</sup> For example, the law does not imply any authority either in a member of the association, or in its managing agent, to bind the company or its members by a contract in the name of the company.<sup>91</sup> The managing superintendent can bind the company only upon such contracts as are usual and necessary in the ordinary prosecution of the work, unless especially authorized thereto.<sup>92</sup> Each member of a cost-book mining company is generally liable to creditors who have furnished the mine with necessaries, for its due working, ordered according to the customary course in such concerns,—liable whether the creditors knew at the time of crediting the mine that he was a shareholder or not.<sup>93</sup> This liability arises, however, from the law of agency and not from the partnership relation of the members. For none of the co-adventurers has, as such, any authority to pledge the credit of the general body for money borrowed for the purposes of the concern.<sup>94</sup> And the fact of his having the general management of the mine, makes no difference, in the absence of evidence of facts from which an implied authority for that purpose can be inferred.<sup>95</sup> Stockholders in mining corporations, organized under the laws of California, there being no subscribed capital stock, are not liable by contract, or by operation of law, to pay to the corporation the nominal par value of their stock, even though such nominal value has not been paid in.<sup>96</sup> Cost-book companies are associations of persons organized for the purpose of working mines or lodes.

*Management.*—Having assembled and decided upon the number of shares into which their capital is to be divided and the number of shares to be allotted to each member, they appoint an agent, commonly called a “purser,” to manage the affairs of the mine. The minutes of their proceedings are entered in a book called the

<sup>90</sup> Kahn v. Smelting Co., 102 U. S. 641. For a history of cost-book companies in England and a collection of adjudications there, see Cook on Corp., pp. 1078, 1089. 206.

Rawle (1885), 8 Am. Bar Assn. Rep. 277.

<sup>91</sup> Collier on Mines, 93; Worth's Law of Mining, 193. Cf. Hawkin's Case, 2 Kay & J. 253.

<sup>92</sup> Ricketts v. Bennett, 4 M. G. & S. 686.

<sup>93</sup> Ricketts v. Bennett, 4 M. G. & S. 686.

<sup>94</sup> In re South Mountain Consolidated Mining Co., 8 Sawyer, C. C. 366, 14 Fed. Rep. 347.

<sup>95</sup> Skillman v. Lachman, 23 Cal.

<sup>96</sup> Jones v. Clark, 42 Cal. 180; Charles v. Eshleman, 5 Colo. 107.

So also in respect of ditch companies for the sale of water. McConnell v. Denver 35 Cal. 365. “Car Trust Securities,” by Francis

"cost-book," and are signed by all present. A license to try for ores for twelve months, or some short period, is then obtained, followed, if the search be promising, by a "sett," that is, a lease of the minerals, or a license to dig, or both, granted by the land owner to the purser, or to one or two of the members, without any expression of trust on their part for the rest, or any other person, for a term of years, commonly twenty-one, stipulating for the annual payment to the land owner of some portion of the ore raised.<sup>97</sup> There being a purser, or manager of the mine, all acts are in general done by him, such as ordering the supply of the necessary materials for working the mine, hiring of labor; and a shareholder has no power to bind his co-shareholders by any contract for materials, nor for money lent, nor upon bills of exchange, nor has the purser any authority to bind any other stockholder. The rules are simple, and all the concerns of the partnership are entered in the cost-book; and all the shareholders meet and order their general affairs, without the assistance of any directing body, and consider and resolve upon the purser's reports, made to them at their meetings, which are seldom at greater intervals than two months. Sometimes there is a committee of management, but they are only appointed from general meeting to general meeting; they have no power to make calls, or to declare dividends, and all their acts are subject to the review of a general meeting.<sup>98</sup>

*Transfer of shares in mining companies.*—In most of the mining districts, it is common to operate the mines under this form of mining partnership, but with different rights and liabilities from those attaching to their members from those attaching to ordinary partnerships, or trading companies. The number of shares into which their capital is to be divided, having been determined, an allotment of them is made to each member, by the purser who enters a record of the names and signatures and number of shares held by each of the shareholders—together with all the proceedings—in the cost-book, which serves also as the company's record of minutes of all its other proceedings. The purser, in these companies, performs the duties ordinarily pertaining to officers of secretary and treasurer, in other associations. A shareholder may get rid of his shares and his liabilities so far as his partners are concerned, without their consent,

<sup>97</sup> Wharton's Legal Dictionary, <sup>98</sup> Wharton's Legal Dictionary,  
*tit.* "Cost-Book Mining Compa- *tit.* "Cost-Book Mining Compa-  
nies."

and without dissolving the partnership, either by a transfer or a simple relinquishment, providing the cost-book rules do not prohibit it, the fact of the transfer being entered by the purser in the cost-book, or simple notice of relinquishment being given the purser.<sup>99</sup> Members of a mining association, therefore, have no right to object to the admission of a stranger into the association, who buys shares of one of their associates,<sup>1</sup> for that right, which is essential to constitute an ordinary partnership, has no place in these mining companies.<sup>2</sup> The mode of transferring shares is simple, and effected with great facility, and in any form, and the mere entry by the purser in the cost-book of the fact of transfer, is sufficient to bind all parties, and constitutes the introduction of a new partner into the concern.<sup>3</sup>

## F.

### BUILDING AND LOAN ASSOCIATIONS.

**§ 1402. Building and loan associations.**—A building and loan association, when incorporated, is for the purpose, strictly, of assisting its members to purchase homes, for themselves, in effect upon the instalment plan, by their regular subscriptions to a fund for the purpose.<sup>4</sup> They are sometimes incorporated with banking powers,<sup>5</sup> but ordinarily, they do not need incorporation for merely loaning on mortgages, or for purchase of lands for subdivision, or for doing real estate business.<sup>6</sup>

## G.

### BENEFICIAL ASSOCIATIONS.

**§ 1403. Mutual benefit societies.**—Mutual benefit societies, not engaged in trade and not partaking of a corporate character, are dealt with in courts of equity for many purposes as partner-

<sup>99</sup> Collier on Mining, 93; Skillman v. Lackman, 23 Cal. 203; Dickinson v. Valpy, 10 B. & C. 128; Ricketts v. Bennett, 4 C. B. 686.

<sup>1</sup> Bissell v. Foss (1884), 114 U. S. 252.

<sup>2</sup> Kahn v. Smelting Co. (1880), 102 U. S. 641, citing Duryea v. Burt, 28 Cal. 569; Settembre v. Putnam, 30 Cal. 496; Taylor v. Castle, 42 Cal. 367.

<sup>3</sup> Wharton's Law Lexicon, *tit.* "Cost-Book Mining Companies."

<sup>4</sup> Jarrett's Exec. v. Cope, 68 Pa. St. 67. *Vide supra*, § 31, BUILDING AND LOAN ASSOCIATIONS.

<sup>5</sup> Henderson, etc. Assn. v. People, 163 Ill. 196, 45 N. E. 141.

<sup>6</sup> Kupfert v. Guttenberg, etc. Assn., 30 Pa. St. 465. As to the nature, rights, and liabilities of building and loan associations, *vide* McIllwaine v. Iseley, 96 Fed. 62, 189 U. S. 122, and Cook v. Emmett, etc. Assn. (1899), 90 Md. 284, 44 Atl. 1022.

ships.<sup>7</sup> But in relation to strangers, and in respect of personal liabilities of their members, they stand more upon the footing of clubs than of trading associations.<sup>8</sup> But the American Mutual Exemption Society, formed for the object of raising funds to free its members from military draft, was held in New York to be a partnership, on the ground that it was not organized under any general or special law.<sup>9</sup> Where there is no authority in the statute to make a contract to pay the death-loss of another, in consideration for transfer of membership and business, such contract is a nullity.<sup>10</sup> A certificate of a mutual benefit society, undertaking to pay a certain sum as benefits, is a contract, which cannot, by by-law, be enforced.<sup>11</sup> Fraternal beneficiary associations, created by statute, have authority to pay benefits to their members, or to those nominated by members as their beneficiaries. Such benefits are payable out of contributions made by members.<sup>12</sup> A by-law providing that a member of a benevolent association failing to pay his dues should forfeit his right to any benefits while in arrears and for a certain period after payment, is void, being unreasonable, vexatious, oppressive and manifestly detrimental to the interests of the corporation.<sup>13</sup> A by-law providing for the expulsion of a member from an incorporated mutual benefit society, whereof the right of membership was a valuable property right, was judicially questioned in an early Pennsylvania case, and it was held that a cause of expulsion therein prescribed, to wit, "vilifying" any other member, was bad, not being necessary for the good government and support of the affairs of the corporation.<sup>14</sup> So also where, under its by-laws, a benevolent society has decided that a member is not entitled to benefits, the decision is conclusive, and will not be reversed or questioned by the courts.<sup>15</sup> When in a proper case the courts undertake to inquire

<sup>7</sup> *Vide supra*, § 30, BENEFICIAL CORPORATIONS. Beaumont v. Meredith, 3 Ves. & B. 180. In Gorman v. Russell, 14 Cal. 532, 18 Cal. 688, the Riggers & Stevedores Union Association of San Francisco was held to be a partnership. Pierce v. Piper, 17 Ves. 15; Collyer on Partnerships, § 53.

<sup>8</sup> Flemng v. Hector, 2 Mees. & W. 172.

<sup>9</sup> Koehler v. Brown, 2 Daly, 78.

<sup>10</sup> Bankers' Union, etc. v. Crawford (Kan. 1903), 73 Pac. 79.

<sup>11</sup> Supreme Council, etc. v. Jordan (Ga. 1903), 45 S. E. 33.

<sup>12</sup> Bankers' Union, etc. v. Crawford (Kan. 1903), 73 Pac. 79.

<sup>13</sup> Cartan v. Father Mathews, etc. Soc. (1869), 3 Daly, 20.

<sup>14</sup> Commonwealth v. St. Patrick's Soc. (1810), 2 Binn. (Pa.) 441, 448.

<sup>15</sup> Osceola Tribe v. Schmidt, 57

into the reasonableness of a by-law, it is a question of law and evidence of its unreasonableness is inadmissible.<sup>16</sup> So, by-laws relating to the rights of members to benefits, under the constitution and by-laws of a benevolent voluntary association, if amended in-accordance with the existing constitution and by-laws, may be so altered as to reduce the amount due a sick member, and an alteration of this kind, even though made during his sickness, does not necessarily impair the obligation of a contract.<sup>17</sup> A benefit society may provide against its liability in case of death by suicide, although its constitution and by-laws do not expressly authorize such provision. The constitution of a benefit association has no force superior to its by-laws, and can not preclude the adoption of another by-law not forbidden by its charter.<sup>18</sup> In beneficial associations the certificate of membership constitutes, with the constitution and by-laws of the society, a contract of insurance,<sup>19</sup> but they are not to all intents and purposes, life insurance companies.<sup>20</sup>

## H.

### STOCK EXCHANGES, BOARDS OF TRADE, CHAMBERS OF COMMERCE.

§ 1404. Stock exchanges, boards of trade, chambers of commerce.—Though it has a property right in its quotations of prices based on legitimate transactions, it is not entitled to invoke the aid of a court of equity in protection of that right, under evidence that ninety-five per cent. of the sales made on the exchange are for future delivery, and are closed at the close of each day's business by a settlement of difference between its members.<sup>21</sup> Board of Trade and telegraph companies which furnish market

Md. 98. But see Sutherland, J., in *People v. Sailors' Snug Harbor* (1868), 54 Barb. 532, 535, where it was said, *obiter*, "The accused inmate should have reasonable notice of such examination, and an opportunity of being heard, of exculpating himself and of disproving the charge. Nor am I willing to concede that the action and proceeding of the trustees or of the executive committee in investigating such charge is beyond the control of, or a review by, this court."

<sup>16</sup> *Commonwealth v. Worcester* (1826), 3 Pick. 462, 473.

<sup>17</sup> *Poultney v. Bachman*, 31 Hun, 49.

<sup>18</sup> *Blasingame v. Royal Circle* (1903), 111 Ill. App. 202.

<sup>19</sup> *Supreme Council v. Forsinger*, 125 Ind. 52, 21 Am. St. Rep. 196.

<sup>20</sup> *Martin v. Stebbings*, 126 Ill. 387.

<sup>21</sup> *Board of Trade of City of Chicago v. L. A. Kinsey* (1903), 125 Fed. 72; *Christie, etc. v. Board of Trade*, 125 Am. Dig. 161, Feb. 1904.

quotations, may do so upon condition that they shall not be used in conducting a bucket-shop.<sup>22</sup> A stockbroker—member of the stock exchange, selling stock for another, which is endorsed in blank, and bid off by another broker, for his undisclosed principal, is neither legal or equitable owner of the stock, or liable as such owner.<sup>23</sup> Brokers' boards, stock and produce exchanges, and organizations of that character, occupy a peculiar position in the law.<sup>24</sup> They cannot be said to be strictly co-partnerships, since their objects do not come within the definition of one. For the objects of such an association of brokers do not involve any combination of property or labor, or any communion of profits from the business transacted by the members.<sup>25</sup> Like a business club, its principal object is the promotion of the convenience of its members by furnishing facilities which aid them in doing their business.<sup>26</sup> The rights and liabilities of the associates are not, however, substantially different from those of partners.<sup>27</sup> They are individually responsible for the illegal acts of their managers or officers.<sup>28</sup> And even though incorporated, the members may be held personally liable, in an action to recover moneys deposited as wagers upon the rise and fall of the market.<sup>29</sup> A board of

<sup>22</sup> *Sullivan v. Postal T. Co.* (1903), 123 Fed. 411.

<sup>23</sup> *Jaecken v. Cangahoga, etc. Co.* (1903), 24 Ohio Circuit Ct. R. 605.

<sup>24</sup> See Hirsch on Fraternal Societies, 8. A board of brokers is not strictly a corporation, partnership or joint-stock company, but a voluntary association, and, in respect to its powers of expulsion, etc. subject to the control of the courts, exercised in the same general manner as towards corporations, and will be enjoined from improperly expelling a member. *Leech v. Harris*, 2 Brewst. (Pa.) 571.

<sup>25</sup> *Belton v. Hatch* (1888), 109 N. Y. 593, 4 Am. St. Rep. 495. "The New York Stock Exchange," for example, "is a voluntary association of individuals, united, without a charter, in an organization for the purpose of affording to the members thereof certain facilities for the transaction of

their business as brokers in stocks and securities, and a convenient exchange or sales-room for the conduct of such transactions." *Belton v. Hatch* (1888), 109 N. Y. 593, 4 Am. St. Rep. 495.

<sup>26</sup> *Belton v. Hatch* (1888), 109 N. Y. 593, 4 Am. St. Rep. 495. A member of the Stock Exchange having forfeited his seat has no right to moneys received from another admitted to the place vacated by him. *Belton v. Hatch* (1888), 109 N. Y. 593, 4 Am. St. Rep. 495.

<sup>27</sup> *Leech v. Harris*, 2 Brewst. (Pa.) 571.

<sup>28</sup> *McGrew v. City Produce Exchange* (1887), 85 Tenn. 572.

<sup>29</sup> Thus in *McGrew v. City Produce Exchange* (1887), 85 Tenn. 572, an action against the incorporators of a co-called "Produce Exchange," to recover moneys deposited as wagers upon the rise and fall of prices of grain, it was held to be no defense to claim

trade, which is an association of persons for their own convenience merely, may decide among what outside persons its telegraphic reports may be distributed.<sup>30</sup> And an incorporated board of trade may exclude from its exchange, telegraph operators who seek to collect market reports for transmission.<sup>31</sup> But a corporation, chartered for the purpose of transmitting stock quotations by telegraph, is a public corporation, and can not make any distinction in respect to persons who wish to partake of the privileges which it was created to furnish, nor refuse its privileges to one willing to pay for them.<sup>32</sup> A board of trade has a property right in, and is entitled to sell, its market quotations, and the purchaser may, by injunction, restrain their appropriation, and use by others before publication of them.<sup>33</sup> But upon publication they become public property.<sup>34</sup> It is not publication of the quotations, to furnish them for the exclusive use of its customers.<sup>35</sup> Its quotations are its private property, and the courts can not compel the board to give them to the public, however great its interest in them may be.<sup>36</sup> A board of trade can not be compelled to furnish its quotations to a bucket-shop corporation,<sup>37</sup> or to a telegraph company for dissemination as a market report.<sup>38</sup> Where the transactions of a board of trade were chiefly in futures, in violation of law, it was denied an injunction against the use of its quotations by a bucket-shop.<sup>39</sup>

**§ 1405. Rules and customs of Stock Exchanges. Memberships. "Seat" in Stock Exchange.**—The modern Stock Exchange is a unique body. It is a non-stock association. It issues

that, the corporation having been legally chartered for an apparently lawful purpose, the incorporators could not be held individually liable for the illegal acts of its managers or officers, where the evidence showed that the incorporation was but a cloak used to cover illegal acts which were contemplated in the organization, and afterwards done as a business.

<sup>30</sup> *Marine Grain and Stock Exchange v. Western Union Telegraph Co.*, 22 Fed. Rep. 23. See Monographic Note by Adelbert Hamilton, 17 Fed. Rep. 828.

<sup>31</sup> *Metropolitan Grain & Stock Exchange v. Chicago Board of Trade*, 15 Fed. Rep. 847.

<sup>32</sup> *Friedman v. Gold & Stock Telegraph Co.*, 32 Hun, 4.

<sup>33</sup> *Cleveland v. Stone* (1900), 105 Fed. 794.

<sup>34</sup> *Board of Trade, etc. v. Thomson, etc. Co.* (1900), 103 Fed. 902.

<sup>35</sup> *Board of Trade v. Hadden-Krull Co.* (1901), 109 Fed. 705.

<sup>36</sup> *Board of Trade v. Christie, etc. Co.* (1902), 116 Fed. 944.

<sup>37</sup> *Central, etc. Exchange v. Board of Trade* (Ill. 1902), 63 N. E. 740.

<sup>38</sup> *Metropolitan, etc. v. Chicago Board of Trade* (1883), 15 Fed. 847.

<sup>39</sup> *Trade v. O'Dell, etc. Co.* (1902), 115 Fed. 574.

no capital stock of its own, nor, as an association, acquires, holds, or deals in stock. Though its members severally deal in stock, there is no partnership association among them. The Exchange is neither a corporation, nor joint-stock association, nor partnership, limited or otherwise. It even has of its own, a language or lexicon of words and phrases, not used in any other association, but whose conventional meaning is so well established, that the courts take judicial notice of it, without special proof. The Exchange, strictly speaking, is the building or room in which the members, as stock brokers, conduct their business; but is more generally defined, as an aggregation of brokers, associated to promote their several interests in buying and selling stocks.<sup>40</sup> The rights and privileges of membership are called a "seat" on the stock and exchange board. A member may sell his "seat," but the purchaser must first be elected a member of the board before he is allowed to take part in its proceedings. So highly prized is a "seat," that in the New York Exchange its price is \$50,000. The property of the association is in equity the property of the members, and a member may pledge or mortgage his seat, and the lien thereon so created may be foreclosed and sold subject to the rules of the Exchange.<sup>41</sup> The visitorial power of the State, as to corporations, does not apply to unincorporated associations of this nature. The differences of its members are settled by submission to arbitration by a body composed of the members of the Exchange.<sup>42</sup> The courts have no power to compel admission of an applicant to membership, or to compel restoration to membership of one who has been expelled. A court's only power is to compel an honest application of the rules of the Exchange.<sup>43</sup>

"The rules of the Stock Exchange, like the customs of any other trade, are binding so long as they are reasonable and legal, and are binding not only upon its members, but upon those dealing with them, and many questions have arisen as to how far those rules are reasonable, and how far members of the Stock Exchange can avail themselves of those rules to escape liability. The general principle applicable to the Stock Exchange, as well as other trades, is that a person who deals in a particular market must be

<sup>40</sup> Clute v. Loveland, 68 Cal. 254.

<sup>43</sup> Lewis v. Wilson, 121 N. Y.

<sup>41</sup> White v. Brownell, 2 Daly (N. Y.), 329; Sewell v. Ives, 61 How. Pr. (N. Y.) 54.

<sup>42</sup> MacDowell v. Ackley, 93 Pa. 277; Otto v. Journeymen, etc., 75 Cal. 308.

Sewell v. Ives, 61 How. Pr. 54. (N. Y.).

taken to deal according to the custom of that market, and he who directs another to make a contract at a particular place, must be taken as intending that the contract may be made according to the usage of that place. But the rules of the Stock Exchange, being the rules of a domestic forum, can not affect persons who are neither members, nor their clients. Thus they can not affect the rights of the general creditors of a defaulting member. A defaulting member, therefore, can not voluntarily pay money to the official assignee to be distributed exclusively amongst those creditors whose claims arise out of Stock Exchange transactions, for that is a fraud upon the general creditors. And if it be urged that that is a rule of the Stock Exchange, the answer, as Lord Justice James said, is that the Stock Exchange is not an Alsatia, the Queen's laws are paramount there, and the Queen's writ runs even into the sacred precincts of Capel Court."<sup>44</sup> "But the official assignee may lawfully distribute among Stock Exchange creditors the money which he receives from those members who owe differences on their contracts with the defaulter, for that is an artificial fund created by the rules, and does not form part of the general assets of the defaulter. According to the usage of the Stock Exchange, a buying jobber is at liberty by a given day, called the 'name day,' to substitute another person as buyer and so relieve himself from further liability on the contract. And this is a reasonable usage founded on general convenience; and the purchase or sale of shares made by one who is not a member, through a broker who is a member, will be treated as made subject to such rule."<sup>45</sup> So where a person, competent and willing to accept the stock, has been found, and a transfer—made and executed by the vendor and accepted by the transferee, the purchasing broker is discharged from liability;<sup>46</sup> and if the transfer is accepted by the recognized brokers of the transferee, it is sufficient to complete the contract.<sup>47</sup> But the name so given must be that of a person *able* and willing to purchase; and if the name given is

<sup>44</sup> Williams' Forensic Facts and Fallacies (1885), 106, 107. It is well settled that no customs among brokers or rules of stock exchanges can divest parties of their legal rights. Robinson v. Norris, 51 How. Pr. 442.

<sup>45</sup> Williams' Forensic Facts and Fallacies (1885), 107; Browne & Theobald's Ry. Law, 71; Maxtel v.

Paine, L. R. 6 Ex. 132. *Cf.* Allen v. Graves, L. R. 5 Q. B. 478.

<sup>46</sup> Grissell v. Bristowe, L. R. 4 C. P. 37; Coles v. Bristowe, 4 Ch. 3.

<sup>47</sup> Loring v. Davis, 32 Ch. Div. 625; Sheppard v. Murphy, L. R. 2 Eq. 544; Bowring v. Shepherd, L. R. 6 Q. B. 309.

that of a non-existent person, a lunatic, an infant, or a person who has not given authority for the use of his name, the jobber will remain liable, though the time limited by the rules for objecting has gone by, and though the jobber be unaware of the incapacity of the person named.<sup>48</sup> The effect of this custom is to treat the ultimate buyer or seller as buying from or selling to the person whose name is given to him on the name day. And this is a reasonable custom, and exempts the jobber from liability in respect of calls or otherwise, where he has given the name of a person capable of purchasing.<sup>49</sup>

*Membership. Seat in Stock Exchanges.*—A seat in the New York Stock Exchange is property, and subject to the payment of debts. The court may order its assignment to one qualified under the rules of the exchange to hold it. Nor is the exchange a necessary party to the proceeding to compel a transfer.<sup>50</sup> And one who, by becoming a member of the New York Stock Exchange, agrees that his seat may be disposed of among his creditors in the exchange in a certain manner, is bound by his agreement.<sup>51</sup> So a by-law of the board regulating the disposal of seats upon the decease of members, is binding upon the personal representatives of a deceased member.<sup>52</sup> A purchaser can not acquire a title to a seat in the Stock Exchange freed from the debts of a former owner, to members of the board.<sup>53</sup> A seat in a stock ex-

<sup>48</sup> Where, however, the transferee is only a fictitious person named by the real purchaser, the jobber will be relieved of liability, provided the vendor has accepted the name. *Maxtel v. Paine*, L. R. 6 Ex. 132.

<sup>49</sup> Where the stocks or bonds a customer desires to trade in are not regularly listed in the New York Stock Exchange, they are known as "Unlisted" or "Outside" securities, and have to be dealt in either in the unlisted department of the Exchange, or on the street. They are not recognized by the Exchange and dealings in them are not governed by the same rules as apply to the listed securities. The latter are the mortgages and shares of such railway and other companies as have filed with the Exchange a sworn state-

ment of their financial condition, and the amount of their capital and bonded debt, described in detail, and which statements have been thoroughly examined and approved by the "Committee on the Listing of Securities" of the New York Stock Exchange. Companies whose securities are so listed are required by the Exchange to give thirty days' notice of any intention to increase or reduce their capital or bonded indebtedness. *Davis' Business Methods & Customs*.

<sup>50</sup> *Londheim v. White*, 67 How. Pr. 467.

<sup>51</sup> *Weston v. Ives*, 97 N. Y. 222.

<sup>52</sup> *Thompson v. Adams*, 12 Phila. 484, 93 Pa. St. 55.

<sup>53</sup> *Thompson v. Adams*, 12 Phila. 484, 93 Pa. St. 55. In this case one who furnished the money with

change, as asset of a bankrupt, vests in the trustee, and he may sell it.<sup>54</sup> If the assignee in bankruptcy refuses to pay the dues upon it, the bankrupt may pay them and retain the seat.<sup>55</sup> A discharge in bankruptcy releases the seat of the bankrupt in the Exchange, from liens of members upon the seat for debts due them.<sup>56</sup> It is property, and subject to be sold to pay the claims of creditors.<sup>57</sup> Though it is not subject to sale under execution.<sup>58</sup> The decision in arbitration between members of a board of trade, is subject to review by a court of equity.<sup>59</sup>

**§ 1406. Stock-brokers. Transfers of stock by agents.—** Stock purchases and sales are very largely made through stock exchanges, organized for that express purpose, and whose members are called stock-brokers, who, as agents, buy and sell stock for their principals, called "customers." Certain terms which they use in their dealings are well recognized and defined by the courts. As, "bull" and "bear," the one endeavoring to raise the market price, and the other to lower it. A "short" sale is one for future delivery of stocks, which the broker expects to buy at a lower price than that ruling the market; in the meantime borrowing the stock, upon deposit of a "margin," to be kept up in case of decline in price, or a "long" sale is made in reliance upon rise in market price. Such sale is held to be not a gambling contract.<sup>60</sup> "Option" contracts of sale of stock are made either by a "put," where one, though not bound to sell to the other, has the privilege to sell to him certain stock within specified time at a fixed price; or, by a "call," where conversely one has similar privilege to buy certain stock of the other, who agrees to sell at

which a member of the Philadelphia brokers' board purchased his seat, upon the death of the member claimed an equitable ownership in the proceeds of the sale of the seat, as against the creditors of the member within the board, who claimed the proceeds under their constitution and by-laws, and it was held that the former could not maintain his claim.

<sup>54</sup> *Page v. Edmunds* (1903), 187 U. S. 596.

<sup>55</sup> *Sparhawk v. Yerkes* (1891), 142 U. S. 1.

<sup>56</sup> *State v. Chamber of Commerce, etc.* (1899), 77 Minn. 308, 79 N. W. 1026.

<sup>57</sup> *Rorke v. San Francisco Stock Exchange, etc.* (1893), 99 Cal. 196, 33 Pac. 881.

<sup>58</sup> *Lowenberg v. Greenebaum*, 99 Cal. 162 (1893), 33 Pac. 794, 21 L. R. A. 399, 37 Am. St. Rep. 42; *Habenicht v. Lissak* (1889), 78 Cal. 351, 20 Pac. 874, 5 L. R. A. 715, 12 Am. St. Rep. 63.

<sup>59</sup> *Ryan v. Cudahy* (1895), 157 Ill. 108, 41 N. E. 760, 49 L. R. A. 353, 48 Am. St. Rep. 305. *Vide supra*, § 1407, note for technical terms used on the stock board.

<sup>60</sup> *Clews v. Jamieson* (1901), 182 U. S. 461; *Am. Live Stock Co. v. Exchange*, 143 Ill. 210, 36 Am. St. Rep. 385.

the buyer's option;<sup>61</sup> or, by a "straddle," which combines the "put" and the "call." There is a "corner," where the "bears" have sold more stock "short" than they can borrow to fill their orders, and must buy from the "bulls," for that purpose,—the stock they have "cornered." Such short sale amounts to a contract to repay borrowed money, or pay for it as a debt.<sup>62</sup> The general rules of agency apply to transfers of stock by agents. They must act strictly within the authority conferred, and, of course, can not transfer the stock when it is given for another purpose.<sup>63</sup> In a case where the same person acts as agent or broker for both the parties to a transfer, the loss will fall entirely upon the vendor, if the certificates have been delivered and the agent absconds with the purchase money, even if the transfer has not been recorded,—and the vendee may demand registration.<sup>64</sup> Where, however, a principal indorses stock in blank and delivers the certificates to his agent, he can not, thereafter, repudiate a sale of the stock which has been made by the agent.<sup>65</sup> A broker is usually an intermediary between the buyer and seller of stock, and the details, of a transaction through a stock-broker, are governed to a very considerable extent by the rules and customs of the Stock Exchange.<sup>66</sup> A broker must obey a "stop order" to

<sup>61</sup> *Treat v. White* (1901), 181 U. S. 264.

<sup>62</sup> *Dibble v. Richardson* (1902), 171 N. Y. 131, 63 N. E. 829.

<sup>63</sup> *Persch v. Quiggle* (1868), 57 Pa. St. 247; *MERCHANTS' BANK v. Livingston*, 74 N. Y. 223; *Fisher v. Brown*, 104 Mass. 259; *Sabin v. Bank of Woodstock*, 21 Vt. 353; *Colquhoun v. Courtenay*, 43 L. J. H. Ch. 338.

<sup>64</sup> *Ex parte Shaw*, 2 Q. B. Div. 463.

<sup>65</sup> *McNeil v. Tenth National Bank* (1871), 46 N. Y. 325; *Strange v. Houston & T. C. R. Co.* (1880), 53 Tex. 162.

<sup>66</sup> *Biederman v. Stone*, L. R. 2 C. P. 405. For purchases or sales in the New York market the commission is one-eighth of one per cent. on the par of 100, being at the rate of \$12.50 on every \$10,000 in bonds, or on one hundred shares of stock the par value of which is \$100 per share. Davis' Busi-

ness Methods of Wall St.. The prices quoted for bonds or stocks on the New York Stock Exchange are so much per cent. on the par of 100. Quotations for bonds in the New York, Philadelphia and Baltimore markets are what are known as "flat," which means that they cover whatever accrued interest there may be due on the bonds, unless it be especially stated that to the price quoted must be added the accrued interest. In the Boston market the quotation means that accrued interest must be added to the price named. Accrued interest is the amount of interest on the par value of the bonds, at whatever rate of interest they draw, from the date the last coupon was paid to the day the purchase, or sale, is closed. Davis' Business Methods of Wall Street. As a rule any individual with the capacity for making contracts may act as broker, though

buy or sell at a fixed price, but must not act before that figure is reached, however fluctuating may be the market.<sup>67</sup> There is no rule that prohibits the broker from acting as agent, both for the buying and the selling customer.<sup>68</sup> Where a broker sells, through another person, to his customer, in order to cheat him, he cannot hold him for the commission.<sup>69</sup> He is liable to his customer for failure to buy or sell as expressly ordered.<sup>70</sup> He is not liable for a margin deposited with the opposite broker. According to custom, he is without responsibility to his customer for its loss.<sup>71</sup> If the broker does not make actual purchases or sales as ordered, but carries fictitious entries of them on his books, he is guilty of fraud and liable to his customer, whatever would have been the result to his customer,—if his orders had been obeyed.<sup>72</sup> A customer, ordering stock purchased in the New York Stock Exchange, is bound by its usage and custom.<sup>73</sup> A broker who buys bonds in the name of a pretended principal undisclosed, can not enforce the contract where he himself is the principal.<sup>74</sup> Or, where he secretly deals in stocks in the name of another who has accounts with the broker, in some of which he is not interested,—he can not maintain a bill for accounting against the brokers.<sup>75</sup> Though the broker may act as agent, both for the selling and buying customer, he can not, on account of his customer, buy from or sell to himself. This is constructive fraud.<sup>76</sup> The bank of deposit by the broker, has a lien upon the money although it may belong to the broker's customer.<sup>77</sup> When the broker acts for undiscovered principals, one of them can sue the other for breach of contract.<sup>78</sup> Where one broker merely introduces a customer to another, he can not charge a commission, although the custom is to allow it.<sup>79</sup> Where the transactions were

this privilege has been denied to national banks. First Nat. Bank v. Hoch, 20 Alb. L. J. 215.

<sup>67</sup> Campbell v. Wright (1890), 118 N. Y. 594, 23 N. E. 914.

<sup>68</sup> Knowlton v. Fitch (1873), 52 N. Y. 288.

<sup>69</sup> Hafner v. Herron (1896), 165 Ill. 242, 46 N. E. 211.

<sup>70</sup> Speyer v. Holgate (1875), 4 Hun, 622.

<sup>71</sup> Gheen v. Johnson (1879), 90 Pa. St. 38.

<sup>72</sup> Prout v. Chisholm (1897), 26 N. Y. App. Div. 54.

<sup>73</sup> Taylor v. Bailey (1897), 169 Ill. 181, 48 N. E. 200.

<sup>74</sup> Paine v. Löeb (1899), 96 Fed. 164.

<sup>75</sup> Mackay v. Hudson (1902), 118 Fed. 919.

<sup>76</sup> Mayo v. Knowlton (1892), 134 N. Y. 250, 31 N. E. 985.

<sup>77</sup> Thomson v. Clydesdale Bank (1893), A. C. 282.

<sup>78</sup> Clews v. Jamieson (1901), 182 U. S. 461.

<sup>79</sup> Gibson v. Crick (1862), 1 Hurl. & C. 142.

gambling, and intended so to be by the parties thereto, the broker can not recover commissions from his customer.<sup>80</sup> A broker must give to his customer reasonable notice to furnish more margin, before selling the stock held on margin.<sup>81</sup> If a broker, in good faith, incurs loss in obeying his customer's instructions, he may recover from him compensation for the loss.<sup>82</sup>

**§ 1407. Stock-broker's instruction from his principal.**—A broker has no power to deviate from the instructions given him by his principal when the order is made,<sup>83</sup> though he may correct

<sup>80</sup> *Harvey v. Merrill* (1889), 150 Mass. 1, 21 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159.

<sup>81</sup> *Lazare v. Allen* (1897), 20 N. Y. App. Div. 616.

<sup>82</sup> *Dos Passos on Stock Brokers*, pp. 123, 802; 80 N. Y. App. Div. 115.

<sup>83</sup> *Clarke v. Meigs*, 10 Bosw. 337; *Parsons v. Martin*, 77 Mass. 111. The whole class of stock operations ordinarily carried on in New York may be classified as follows: 1. Buying for a rise, or going "long" of stocks. 2. Selling for a decline, or going "short" of stocks. 3. Buying or selling as above, but on "options." 4. Buying or selling "privileges," generally known as "puts," "calls" and "spreads." The last named are not recognized by the New York Stock Exchange. 1. Buying for a rise is by far the most ordinary transaction with non-professional speculators. In this case the customer usually deposits \$1,000 in his broker's hands as a ten per cent. "margin" on one hundred shares of stock which he orders to be purchased, and which his broker holds, or "carries," for him until ordered to sell the same, or until the margin is about exhausted. In the latter case, if the customer, on request, fails to put up more margin, the broker is at liberty so sell the stock immediately, and charge him with the loss, if any. Interest is charged the customer on the purchase price, with buying commission added, usually at six per cent., as

long as the stocks are carried. In case of a tight money market the broker is entitled to charge his customer any additional price which money actually commands, for carrying the stocks. A party carrying stocks for a rise is said to be "long" of the market or a "bull." 2. Selling for a decline, or going "short" of stocks (being a "bear"), is also a very common transaction, and is simply the opposite of buying, as above, except that the seller, not having the stock, is obliged to borrow it for present delivery, and take the risk of buying it back at a future day, to return to the lender. Aside from the ordinary fluctuations of the market, the chief risk in thus "selling short" is in the chance of a "corner" in the stock in case a clique get control of it and force prices up to extraordinary figures. This is a rare operation, but has at times been effected in the New York market with disastrous consequences to those who were "short" of the cornered stocks. As a general rule, nothing beyond the ruling rate of interest is paid for the use of the stock; but in case it is scarce, a consideration has to be paid for the use from day to day. Margins and commissions are the same as above. 3. Buying or selling on "options" is a transaction in which the purchaser or seller, as the agreement may be, has the option to call for or tender the stock at the price named, at any time within the

a palpable error so as to preserve his client's interests.<sup>84</sup> And where the order given is for the purchase of stocks, there is an implied authority to consummate the trade,<sup>85</sup> except, of course, where the client is incapable of contracting, in which case the broker becomes liable.<sup>86</sup> It has been claimed that it is an unreasonable custom or rule that a broker is only bound to recognize the person actually employing him, and to obey the directions of that person only as to the disposal of the proceeds of a sale of stock.<sup>87</sup> A broker, in executing the instructions given by a customer, can not become a party to a contract which he makes in

period limited by the contract; but the Stock Exchange does not recognize contracts running over sixty days. In purchases on buyer's option (for any time over three days) the buyer is charged with interest on the price of the stock up to the time he calls for it. 4. Stock privileges, or "Puts," "Calls," and "Spreads" or "Straddles," as they are commonly called, are contracts entitling the holder to receive or deliver certain stocks at any time within a period limited (usually thirty or sixty days) and at a price therein specified; in the case of "spreads" the privilege is either to receive or deliver. A certain cash price is paid for the contract by the purchaser, and his entire liability in the transaction is limited to that amount; and, as the question of interest does not enter into the matter, the uncertainties of the money market need not be taken into consideration. A "Put" entitles the holder to put or deliver stock to the signer thereof, within the time and at the price therein named. A "Call" entitles the holder thereof to call for or demand stock from the signer thereof, according to terms specified. A "Spread" is a double privilege, and entitles the holder either to deliver to, or demand from, the signer thereof, the stocks named in it, according to the terms of the agreement. If

the prices named in both cases are the same, then it is known as a "Straddle." To the purchaser of "Puts," "Calls," or "Spreads" there is no liability to loss beyond the amount paid in cash for the contract. Davis' Business Methods & Customs.

<sup>84</sup> Luffman v. Hay, 13 N. Y. Week. Dig. 324.

<sup>85</sup> Bayley v. Wilkins, 7 Com. B. 886. "All orders except 'stop-loss' orders are considered in force for the day only on which they are given, when nothing to the contrary is stated. When no price is mentioned by a customer, in giving or sending an order, it is understood to be at the market price, and the broker fills it at the best price obtainable at the time. When the stock ordered bought (or sold) is limited, nothing can be done until that limit is reached. When the customer says buy or sell at *about* a certain price, it is understood that his broker can take a discretion of one-eighth of one per cent. either way." Davis' Business Methods & Customs.

<sup>86</sup> Ruchizky v. De Haven, 97 Pa. St. 202; Nickalls v. Merry, L. R. 7 H. L. 520; Maxted v. Paine, L. R. 4 Ex. 81; Heritage v. Paine, 2 Ch. Div. 594, 34 L. T. 947; Dent v. Nickalls, 29 L. J. Ch. 536.

<sup>87</sup> Williams' Forensic Facts & Fallacies (1885), p. 108.

behalf of his customer,<sup>88</sup> but must act in good faith and can not derive any advantage from the transaction hostile to the best interests of his client.<sup>89</sup> A reasonable time is given for the execution of orders.<sup>90</sup>

**§ 1408. "Stock-jobbing" contracts. "Corners" in stock.**—At common law, a contract depending upon the happening of an event in the future, was not invalid.<sup>91</sup> And much as the judges have lamented the practice, they have not seen their way to declare it illegal. It is no doubt reprehensible, but, so far at least as the broker is concerned, it lacks the essential element of wagering, which is that each party shall win or lose according to the event.<sup>92</sup> It is under the cloak of contracts for the future delivery of shares, that gambling contracts are concealed. The latter are against public policy; and numerous attempts have been made to prohibit the practice by legislation.<sup>93</sup> But the history of these stock-

<sup>88</sup> *Marye v. Strouse*, 5 Fed. Rep. 483; *Conkey v. Bond*, 36 N. Y. 427; *Tausig v. Hart*, 58 N. Y. 425; *Robinson v. Mollett*, L. R. 7 H. L. 802; *Brookman v. Rothschild*, 3 Sim. 153.

<sup>89</sup> *Levy v. Loeb*, 85 N. Y. 365, 89 N. Y. 386; *Voris v. McCready*, 16 How. Pr. 87; *Dey v. Holmes*, 103 Mass. 306; *Pickering v. Demerritt*, 100 Mass. 416.

<sup>90</sup> *Fletcher v. Marshall*, 15 Mees. & W. 755.

<sup>91</sup> *Irwin v. Williar*, 110 U. S. 499. Speculative transactions, as distinguished from regular invested dealings, are those conducted on "margins," and in which the operator does not pay or receive the actual price of the stocks bought or sold, but simply places a sufficient margin in the hands of his broker (usually ten per cent. of the par value) to protect the latter against loss from fluctuations in the price. A party who purchases stocks in anticipation of a rise, but pays the actual price thereof, is not, according to the usual acceptation of the term, engaged in speculation. *Davis' Business Methods & Customs*.

<sup>92</sup> The broker can, therefore, in such a case sue his principal for

commission and indemnity. Williams' *Forensic Facts & Fallacies* (1885), p. 108; Browne & Theobald's Ry. Law, 70. It should be clearly understood that the ultimate responsibility in stock operations is with the customer. He runs the risk of the failure of his own broker; nor can he hold him responsible for losses occasioned by the fraud or failure of others with whom he had made contracts. The broker stands in the position of an agent acting for his principal.

<sup>93</sup> 8 & 9 Vic., ch. 109, § 18; *Thacker v. Hardy*, 4 Q. B. Div. 689; *Grizewood v. Blane*, 11 C. B. 526; *Barry v. Croskey*, 2 J. & H. 1; N. Y. 1 Rev. Stat. 662, § 8; *Harris v. Tumbridge*, 83 N. Y. 92; *Kingsbury v. Kirwan*, 77 N. Y. 612; *Story v. Saloman*, 71 N. Y. 420; *Yerkes v. Saloman*, 11 Hun, 471; Laws of Pa. 1841, p. 398, § 6 (which has, however, been repealed); *Krause v. Settley*, 2 Phila. 289; *Chillas v. Snyder*, 1 Phila. 289; Rev. Stat. Illinois, ch. 38, § 130 (Cothran's ed. 1887); *Pickering v. Cease*, 79 Ill. 328; *Sanborn v. Benedict*, 79 Ill. 309; *Pixley v. Boynton*, 79 Ill. 351; 12 U. S. Stat. 719; Gen. Stat. Mass.

jobbing laws seems to prove conclusively that they have never been effective in preventing speculations in stocks. It is said that "in almost every instance in which they have been adopted, after lingering for years on the books, scorned and violated by 'the unbridled and defiant spirit of speculation,' despite the earnest efforts of the courts to enforce them, they have finally been repealed."<sup>94</sup> The intent of the parties, is the element governing the application of legal rules to such contracts, and where the understanding is, either expressly or by implication, that there is to be no delivery, but merely an adjustment of balances between the parties, it is a wager contract and void.<sup>95</sup> The question of intent, in such a transaction, is usually a question for the jury; and when it is found that there was an intention to deliver, even though one of the parties to the transaction did not share it, the contract is valid.<sup>96</sup> When the transaction is made through a broker, the

ch. 105, § 6; *Brown v. Phelps*, 103 Mass. 313; *Price v. Minot*, 107 Mass. 49; *Colt v. Clapp*, 127 Mass. 476; Ohio Laws, May, 1885. That "cornering" the market is illegal, see *Arnot v. Pittston, etc. Coal Co.*, 68 N. Y. 558; *Sampson v. Shaw*, 101 Mass. 145; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Raymond v. Leavitt*, 13 Cent. L. J. 110; *Barry v. Croskey*, 2 Johns. & H. 1. With respect to contracts to buy or sell stock for the purpose of controlling the market price, see *Tobey v. Robinson*, 99 Ill. 202; *Quincy v. White*, 63 N. Y. 370, 383; *Fisher v. Bush*, 35 Hun, 641; *Livermore v. Bushnell*, 5 Hun, 285.

<sup>94</sup> *Dos Passos, Stock-brokers and Stock Exchanges*, 405; *Dewey on Contracts for Future Delivery and Commercial Wagers*, 23.

<sup>95</sup> In an action to recover a sum of money alleged to be due on a sale of stock the defense set up was that the transactions were gambling transactions, and that it was never intended that any of the stocks or shares should be delivered on one side or the other. It appeared from the evidence that the defendant was a working gardener in receipt of 90 $\frac{1}{2}$  per

annum. Before the transactions, the subject of this action, commenced, there had been various dealings between the plaintiff and the defendant, which had resulted in a balance in the defendant's favor. After this various other transactions were entered into, chiefly buying and selling "Tinto" shares, which eventually resulted in a loss to the defendant of over 400 $\frac{1}{2}$ . There was no suggestion in any of the correspondence that the shares should be taken up, although in one case the plaintiff actually had taken up some shares to save himself. It was held, that whether it was a gambling transaction was simply a question of evidence, and that, since neither party contemplated delivering or accepting shares, it was a gambling transaction and void. *James v. Sheppard* (Q. B. Div. 1889), 6 Ry. & Corp. L. J. 478; *Roundtree v. Smith*, 108 U. S. 269; *In re Hunt*, 26 Fed. Rep. 739; *Greenhood on Public Policy*, 230-237.

<sup>96</sup> *Irwin v. Williar*, 110 U. S. 499; *Whitesides v. Hunt*, 97 Ind. 191; *Pixley v. Boynton*, 79 Ill. 351; *Gregory v. Wendell*, 39 Mich. 337.

person employing him is responsible to him for his commissions and disbursements, to the same extent as though the contract were legal and a *bona fide* delivery were intended,<sup>97</sup>—even though the broker were aware of its being a gambling contract.<sup>98</sup>

*"Corners" in stock.*—A "corner" in the stock market as to the stock of some particular corporation, is brought about by contracts for the purchase of shares for future delivery, with the purpose of controlling the market. Such a pooling agreement between the buyer and the seller, to deceive others, is illegal and void.<sup>99</sup> No suit lies against a broker for carrying out a pool to "corner" the market.<sup>1</sup>

**§ 1409. Contracts for future delivery of stock.**—A contract by which stock is sold at a certain price, with the option to the purchaser to resell it at a future time for an increased price,—which increase is only the amount of interest which, by the time of exercising the option, would accrue on the amount paid for the stock,—is not a gambling contract.<sup>2</sup> Nor is an agreement void, by which a trustee, with the consent of his beneficiary, assigns stock held by him in his fiduciary capacity to a third party as trustee to sell and account to the owner, or, if not sold within a year, to return it to the owner.<sup>3</sup> And a contract for the sale of stock without delivery, is not necessarily void, even if the time of delivery is not fixed,—for the implication is that delivery shall be made within a reasonable time, and either party may enforce the performance if he has not otherwise waived his rights.<sup>4</sup> A contract, however, to sell, "in consideration of one dollar, receipt of which is acknowledged," certain railway stock at a stated price, "if taken on or before" a certain day, is void on its face, under a statute which makes void all contracts for the future sale of grain or railroad stock, whether such contracts are to be settled by paying differences or not.<sup>5</sup>

<sup>97</sup> *Thacher v. Hardy*, 4 Q. B. Div. 685; *Ex parte Rogers*, 15 Ch. Div. 207.

<sup>98</sup> *Knight v. Fitch*, 15 C. B. 566; *Jessopp v. Lutwyche*, 10 Ex. 614; *Lyne v. Liesfield*, 1 H. & N. 278; *Ex parte Rogers*, 15 Ch. Div. 207.

<sup>99</sup> *Newark v. Elliott* (1855), 5 Ohio St. 113; *Sampson v. Shaw* (1869), 101 Mass. 145, 3 Am. Rep. 327; *Veazey v. Allen* (1903), 173 N. Y. 359, 66 N. E. 103.

<sup>1</sup> *Leonard v. Poole* (1889), 114

N. Y. 371, 21 N. E. 707, 4 L. R. A. 728, 11 Am. St. Rep. 667.

<sup>2</sup> *Richter v. Frank* (1890), 8 Ry. & Corp. L. J. 66, 41 Fed. Rep. 859.

<sup>3</sup> *Duchenim v. Kendall* (1889), 149 Mass. 171.

<sup>4</sup> *Bruce v. Smith*, 44 Ind. 1. *Acc. Keichuer v. Gettys*, 18 S. C. 521; *Cheale v. Kenward*, 3 De G. & J. 27; *Stewart v. Canty*, 8 Mees. & W. 160.

<sup>5</sup> *Schneider v. Turner* (1889), 7 Ry. & Corp. L. J. 46, 130 Ill. 28.

## I.

## POLITICAL LEAGUES. BAR ASSOCIATION.

**§ 1410. Political associations. Bar association.**—The members of a political association, known as the Morgan and Webb Association, who advised or assented to giving a ball, thereby became personally liable for the supper furnished at the same.<sup>6</sup> And the members of a committee of a political party, who voted for a resolution whereby a campaign worker was employed, became personally liable for his pay; and the expiration of the terms of office did not excuse those members, nor make their successors liable for the debt.<sup>7</sup> There is no power in the court to compel the admission of a person to membership in any political association of individuals.<sup>8</sup>

*Bar association.*—The Louisiana Bar Association is a strictly private corporation; all questions of membership must be left to be determined by its own rules and regulations.<sup>11</sup>

## J.

## SOCIAL CLUBS, ATHLETIC, BOATING AND RACING ASSOCIATIONS.

**§ 1411. Social clubs.**—Social clubs have been variously likened to corporations, partnerships, mutual benefit associations, joint-stock companies and to bodies of co-owners or tenants in common.<sup>12</sup> But a club is not a corporation, nor has it a *quasi-corporate* character,<sup>13</sup> having no existence apart from its mem-

<sup>6</sup> Downing v. Mann, 3 E. D. Sm. 36.

<sup>7</sup> Sizer v. Daniels, 66 Barb. 429.

<sup>8</sup> McKane v. Adams (1890), 123 N. Y. 609, 25 N. E. 1057, 20 Am. St. Rep. 785.

<sup>11</sup> State *ex rel.* v. Louisiana Bar Assn. (La. 1904), 36 So. 50, 241.

<sup>12</sup> Clubs, it is true, resemble corporations in that, in a sense, they have perpetual succession; they resemble partnerships in that they share some benefit between the members, and companies in that they are undoubtedly associations; they are sometimes co-owners, and they do confer mutual benefits; but they differ from all these—from corporations in that they do

not act or suffer as a whole; from partnerships and companies in that they are not formed for the purpose of gain or prevention of loss; from co-owners in that they have not the right of co-owners in the transmission of their interest, and from mutual benefit societies, because the nature of the benefits they confer is definite and they are not regulated by act of parliament. Leache's Club Cases, 10, 11.

<sup>13</sup> Clubs have sometimes been called *quasi-corporations*, but the term is either misleading or unmeaning. It is misleading if it implies that a club has any existence apart from its members, or can be regarded as in any way act-

bers.<sup>14</sup> While in respect of the relations of club-men, among themselves, the organization may be said to be a partnership,<sup>15</sup> it is not a partnership in its relation to outsiders.<sup>16</sup> It is generally managed through trustees who make all contracts, and acquire and dispose of the property necessary for its uses.<sup>17</sup> The rights and liabilities of its members depend upon their agreement of association.<sup>18</sup> In the absence of statute, no action can be brought by or against it by its name, but in the name of all its members.<sup>19</sup> It is not a mutual benefit society, for the mutual benefit therein referred to, is of a pecuniary nature, which the purposes of a social club do not contemplate.<sup>20</sup> No deductions, as to clubs, drawn from any of these institutions are of much service in understanding or dealing with clubs.<sup>21</sup> The words "Society" and "Club" have no definite meaning in the law. There is no uniformity in their constitutions or rules.<sup>22</sup> Though not incorporated, clubs are recognized as having a sort of entity or *quasi* personality.<sup>23</sup>

ing as a whole; and, if it does not mean that, it is simply unmeaning. Leache's Club Cases, 6.

<sup>14</sup> "An unincorporated club, although it is a collection of individuals united in one body, which is formed by a changeable set of members, has no existence, apart from its members, as a corporation has, inasmuch as it is not created by a grant from the sovereign power." "Club Law," 27 Alb. L. J. 326; Liggett v. Ladd, 17 Oreg. 89, 21 Pac. 133; Crawford v. Gross, 140 Pa. St. 297, 21 Atl. 356; Curd v. Wallace, 7 Dana (Ky.), 190, 32 Am. Dec. 85.

<sup>15</sup> The rights of associates in the property, and the modes of enforcing these rights, are not materially different from those of partners in partnership property. "Club Law," 27 Alb. L. J. 326; McMahon v. Rauhr, 47 N. Y. 69.

<sup>16</sup> In Walter v. Thomas, 42 How. Pr. 344, it is assumed, without argument, that the members of a club, formed for social purposes, are not partners. A club is not even a *quasi*-partnership. A *quasi*-

partnership, or, a partnership as against third persons, may be created even without an agreement to share profits, by two or more persons holding themselves out to the world as partners, even though they are not such. Lindley on Partnership, 33 and 37. But it is manifest the members of a club do not hold themselves out as partners. The conclusion of reason therefore is, that a club is not a partnership or *quasi*-partnership. Leache's Club Cases, 7.

<sup>17</sup> Crawford v. Gross, 140 Pa. St. 297, 21 Atl. 356.

<sup>18</sup> Austin v. Searing, 16 N. Y. 112, 69 Am. Dec. 665; Logan v. McNaugher, 88 Pa. St. 103.

<sup>19</sup> Curd v. Wallace, 7 Dana (Ky.), 190, 32 Am. Dec. 85; Lewis v. Tilton, 64 Iowa, 220, 19 N. W. 911, 52 Am. St. Rep. 436.

<sup>20</sup> "Club Law," 27 Alb. L. J. 326; Irvine v. Forbes, 11 Barb. 587.

<sup>21</sup> Leache's Club Cases, 11.

<sup>22</sup> Commonwealth v. Domphret, 137 Mass. 564, 50 Am. Rep. 340.

<sup>23</sup> People v. Adelphi Club, 149 N. Y. 5.

## K.

## LODGES, SECRET SOCIETIES.

**§ 1412. Lodges, secret societies.**—Lodges of Free Masons, Odd Fellows and the like, being in the nature of benevolent and social societies and having no community of interests for business purposes, are not to be classified as partnerships nor are their members personally liable in the same manner as the members of a firm.<sup>24</sup> There is an early case in which, a society of Odd Fellows, an association of persons for purposes of mutual benevolence, having erected a building, which was afterwards sold at sheriff's sale in satisfaction of mechanics' liens, the court said (in regard to the distribution of the proceeds) that as respected third persons, the members were partners, and that lien creditors, who were not members, were entitled to preference as against the liens of members.<sup>25</sup> But "had the members been called joint-tenants of the real estate, the same principle in the distribution would have applied,"—and the reasoning in the case may well be questioned.<sup>26</sup> As stated above, the liability of the members of a club to persons with whom the executive committee has contracted, stands upon the relation of principal and agent, rather than upon any connection as partners.<sup>27</sup> And a mutual benefit society, such as a Masonic or Odd Fellows lodge, partakes more of the character of a club than of a trading association.<sup>28</sup> So,

<sup>24</sup> *Ash v. Guie* (1881), 97 Pa. St. 493, 39 Am. Rep. 818; *Payne v. Snow*, 12 Cush. 443. In holding that the court would not dissolve a "tent" of the Order of Rechabites, the New York court of appeals said, *per* Miller, J.: "Associations of this description are not usually partnerships. There is no power to compel payment of dues, and the right of the member ceases when he fails to meet his annual subscription. This certainly is not a partnership, and the rights of co-partners as such are not fully recognized. The purpose is not business, trade or profit, but the benefit and protection of its members as provided for in its constitution and by-laws. In accordance with well established rules, no partnership ex-

ists under such circumstances." *Lafond v. Deems* (1880), 81 N. Y. 507, 514. *Acc. McMahon v. Rauhr*, 47 N. Y. 67. In *Lloyd v. Loaring*, 6 Ves. 773, although the members of a Masonic lodge were held liable individually it was on the ground of joint-ownership of personal property. There was no intimation in Lord Eldon's opinion that he considered them to be partners.

<sup>25</sup> *Babb v. Reed*, 5 Rawle, 151.

<sup>26</sup> *Ash v. Guie*, 97 Pa. St. 493, criticising *Babb v. Reed*, 5 Rawle, 151.

<sup>27</sup> *Vide supra*, §§ 1381, 1382; *Fleming v. Hector*, 2 Mees. & W. 172, *per* Lord Abinger.

<sup>28</sup> *Ash v. Guie* (1881), 97 Pa. St. 493, 39 Am. Rep. 818.

where a lodge has bought a piece of land and erected a building thereon to be used as a place of meeting, there is, in the absence of evidence, no inference that a person who joined the lodge, thereby bound himself as a partner in the business of purchasing lands and erecting buildings, or as a partner, so that other members could borrow money on his credit. Neither the officers, nor any number of members, have a right to contract debts for the building of a temple, which would bind any other member from the mere fact of membership. But those who engage in the enterprise are liable for the debts they contract, and all are included in that liability who assent to the undertaking, or subsequently ratify it. And so with reference to borrowing money. A member who subsequently approves the borrowing can be held liable, on the ground of ratification of the agent's acts.<sup>29</sup>

## L.

### COLLEGES AND UNIVERSITIES.

**§ 1413. Colleges and universities. Literary and scientific societies.**—In Pennsylvania, a business school that in its name unlawfully uses the word “university,” may be restrained by injunction at suit of the State.<sup>30</sup> The fact that an educational institution may acquire and transfer property necessary for its purposes, and may charge for tuition, does not make it a corporation for pecuniary profit.<sup>31</sup> A chartered university with power to hold and use real and personal property for its benefit, may invest its funds in notes, bonds and mortgages.<sup>32</sup> In the State court, it was held that the trustees of Dartmouth College, having no private interest in the administration of the funds committed to their charge, but holding them merely as trustees for a public charity, were not a private, but a public corporation, and that, as such, their charter was subject to amendment at the discretion of the legislature, without their concurrence or assent. The sanctity of charters granted to *private* corporations, and their inviolability under the prohibition in the federal constitution against the passage of laws impairing the obligations of contracts,—was fully ad-

<sup>29</sup> *Ash v. Guie* (1881), 97 Pa. St. 493, 39 Am. Rep. 818; *Ferris v. Thaw*, 72 Mo. 446.

<sup>30</sup> *Vide supra*, §§ 32, 33, LITERARY, EDUCATIONAL AND SCIENTIFIC CORPORATIONS; Common-

wealth v. Banks (Pa. 1901), 48 Atl. 277.

<sup>31</sup> *McLeod v. Lincoln, etc. Univ.* (Neb. 1903), 96 N. W. 26.

<sup>32</sup> *Cass v. Yale University*, 107 Ill. App. 518 (1903).

mitted by the State tribunal.<sup>33</sup> The one material issue, therefore, when the case came before the Supreme Court of the United States was, whether the trustees of the college were a public or a private corporation; and it was there decided that they were none the less a private corporation because of the public nature of the charity and of their having no personal, private interest in the funds which they administered.<sup>34</sup> Thus *mandamus* will issue to the trustees and faculty of a public university endowed by congress and supported by State appropriations, to compel the admission of a person improperly rejected.<sup>35</sup> Although an institution may have been founded originally by private donations, the State has a right to follow its own contributions thereto and to ascertain how they are being applied.<sup>36</sup> A corporation organized and chartered for the purpose of holding the title to a college building and property erected and maintained by a religious denomination, is bound by contracts made by the synod of the denomination for the erection of the building, the synod being a shifting, unincorporated body, which, however, controls the denomination.<sup>37</sup> The State university is a State institution and its board of regents is an agent of the State.<sup>38</sup>

## M.

## CHARITABLE ASSOCIATIONS, HOSPITALS, "HOMES," AND ASYLUMS.

**§ 1414. Charitable associations.**—Although an association is formed for the purpose of dispensing public charity, and although it may have received a donation from the State, it is not a public corporation or society, subjecting it to special legislative control. It may be a private charity, although publicly dispensed.<sup>39</sup> A

<sup>33</sup> Trustees of Dartmouth College v. Woodward (1817), 1 N. H. 111.

<sup>34</sup> Dartmouth College v. Woodward (1819), 4 Wheat. 518.

<sup>35</sup> State v. White, 82 Ind. 278, 43 Am. Rep. 496, holding that a university so endowed and maintained cannot refuse admission to one otherwise entitled, because of his refusal to sign a pledge to disconnect himself during his college course from a secret society.

<sup>36</sup> "Relation of Bloomingdale Asylum to the State," a Report by Prof. Ordronaux, State Commissioner of Lunacy (1878), 17 Alb.

L. J. 403. Cf. Kyd on Corporations, 51.

<sup>37</sup> McLaughlin v. Concordia College (1885), 20 Mo. App. 42.

<sup>38</sup> Von Forel v. State, 96 N. W. 648 (Neb. 1903); *Vide*, § 1414. What is said of charitable associations and citations in notes of section 1414 also apply to colleges, universities and literary and scientific associations.

<sup>39</sup> *Vide supra*, § 11, ELEEMOSY-NARY CORPORATIONS; Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518; *Vide supra*, § 1413; Cary Library v. Bliss, 151 Mass. 364.

corporation organized exclusively for maintaining a public charity, as a hospital or asylum, an industrial school or house of refuge, the funds of which are derived from public and private donations,—is not liable for the negligence or wrongs of its servants if it has exercised due care in their selection and employment.<sup>40</sup> When incorporated (not for profit,) charitable, religious and literary associations have implied power to invest their surplus funds in the stock of other corporations.<sup>41</sup>

## N.

### RELIGIOUS SOCIETIES, CHURCHES.

**§ 1415. Religious societies. Churches.**—The religious society is something of an anomaly in American corporation law, the object of the society being the prosecution of a business not controlled and regulated by the general laws of the State; yet, it has secular affairs, and real and personal property. These are subjected to the same rules of law which govern the property of individuals, or of corporations. Each denomination has its own code of rules, which operate precisely as articles of incorporation or by-laws of a stock corporation, for its government; but the civil courts, nevertheless, exercise a supervision to protect the society property and rights of individual members from the exercise of arbitrary power by the society, whether it is incorporated or not.<sup>42</sup> While the constitution of the United States prohibits congress from making any law respecting the establishment of religion,<sup>43</sup> and the constitutions of the several States generally guarantee the free exercise and enjoyment of religious profession and worship without discrimination,<sup>44</sup> there are, nevertheless, statutory provisions in the several States authorizing the incorporation of religious organizations and regulating the government thereof.<sup>45</sup> And the New York legislation, for example, not only regulates the organization of churches in general, but also con-

<sup>40</sup> *Downes v. Harper Hospital*, 101 Mich. 555, 45 Am. St. Rep. 427; *Newcomb v. Boston, etc. Dept.*, 151 Mass. 215.

<sup>41</sup> *Hedges v. New England, etc. Co.* (1850), 1 R. I. 312, 53 Am. Dec. 624; *Pearson v. Concord R. R.*, 62 N. H. 537 (1883).

<sup>42</sup> Andrew's American Law, §§ 214 and 510, citing *Chase v. Cheney*, 58 Ill. 509; *Philomath*

*College v. Wyatt*, 27 Oreg. 390, 27 L. R. A. 68; *Lamb v. Cain*, 129 Ind. 486, 14 L. R. A. 514; *Schleben v. Keiter*, 156 Pa. St. 119, 22 L. R. A. 161; *Vide supra*, § 13, CORPORATIONS FOR RELIGIOUS PURPOSES.

<sup>43</sup> United States Const. Amendment, I.

<sup>44</sup> New York Constitution, art. 1, § 3.

<sup>45</sup> New York Laws 1813, ch. 60.

tains provisions respecting particular denominations, rendered necessary by the peculiar polity of each.<sup>46</sup> But in West Virginia, the State constitution prohibits the granting of charters of incorporation, to any church or religious denomination. It has been held, however, that an act of legislature incorporating the individuals composing the Executive Committee of Publication, commonly called the "Presbyterian Committee of Publication," by the name and style of "The Trustees of the Presbyterian Committee of Publication," is not, in effect, the incorporation of the Presbyterian church itself, in violation of the constitution, nor against the public policy of the State.<sup>47</sup> When a church seeks to be incorporated, by a charter which declares that it intends to be governed by the canons of a certain religious denomination, it is not requisite first to show that it is acting in conformity with those canons. That is a matter to be determined subsequently, if the rights of the corporation should be encroached upon or denied.<sup>48</sup> Religious corporations are classed with charitable, educational and literary corporations, by the statutes of many States. Those who adhere to the settled doctrine of the church, although they be in the minority, are entitled to the church property.<sup>49</sup>

**§ 1416. Ecclesiastical and lay corporations.**—Ecclesiastical corporations are common in England, where they were created to perpetuate the authority and rights of the church. They were composed only of monks, bishops, or other spiritual persons.<sup>50</sup>

<sup>46</sup> The Protestant Episcopal Church, N. Y. Laws of 1813, ch. 60, § 1, as amended by Laws of 1868, ch. 803; The Reformed Protestant Dutch Church, N. Y. Laws of 1813, ch. 60, § 2, as amended by Laws of 1869, ch. 197; The Roman Catholic Church, N. Y. Laws of 1863, ch. 45; The Greek Church, N. Y. Laws of 1871, ch. 12; The Reformed Presbyterian Church, N. Y. Laws of 1822, ch. 187; The Baptist Church, N. Y. Laws of 1876, ch. 329; Free Churches, N. Y. Laws of 1854, ch. 218. N. Y. Laws of 1875, ch. 381, provides for the incorporation of Presbyteries. As to The Presbyterian Synod, see N. Y. Laws of 1884, ch. 340; The Lutheran Synod, N. Y. Laws of 1868, ch. 461; The German United Evangelical Synod, N. Y. Laws of

1872, ch. 762; The Unitarian Church Conference, N. Y. Laws of 1886, ch. 209; and, in general, as to diocesan conventions, presbyteries, synods, annual conferences and other governing bodies having jurisdiction over a number of churches, see N. Y. Laws of 1876, ch. 110.

<sup>47</sup> Wilson v. Perry (W. Va. 1887), 1 S. E. Rep. 302, construing W. Va. Act of March 8, 1873, and W. Va. Const., art. v, § 17, Green, J., dissenting.

<sup>48</sup> *In re Holy Communion Church*, 4 Phila. 126.

<sup>49</sup> Bear v. Heasley, 98 Mich. 279, 24 L. R. A. 615.

<sup>50</sup> *Vide supra*, § 12, ECCLESIASTICAL AND LAY CORPORATIONS; 1 Bl. 470; 2 Kyd, 22; Ford v. Harrington, L. R. 5 C. P. 282.

In the United States, ecclesiastical corporations are practically unknown.<sup>51</sup> Lay corporations include all other than ecclesiastical.<sup>52</sup>

**§ 1417. Membership in religious societies.**—In the case of religious organizations a distinction is drawn between membership in the spiritual body and membership in the secular society or corporation connected therewith.<sup>53</sup> It is not essential, however, to the legal existence of a society claiming to be a church, and engaged in the lawful promotion or defense of religion, that it be connected with any other society, civil or ecclesiastical, incorporated or unincorporated.<sup>54</sup> Questions in regard to the eligibility of applicants for admission or in regard to the expulsion of members from the spiritual body, are determined by the several creeds, articles or confessions of each sect or denomination, and are beyond the cognizance of the law.<sup>55</sup> Accordingly, *mandamus* will not lie to reinstate a person expelled from the ecclesiastical organization, the expulsion not being an act of the secular corporation, and no property or other civil rights being affected thereby.<sup>56</sup> But membership in the secular society may consist in regular attendance upon its meetings and in contributing to its support. Of this, the law will take notice, and will pass upon the rights, duties and liabilities incident thereto.<sup>57</sup> In mutual in-

<sup>51</sup> Robertson v. Bullions, 11 N. Y. 243.

<sup>52</sup> Trustees Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 1 Cum. Cas. 490, 1 Bl. Com. 470.

<sup>53</sup> Sale v. Baptist Church (1883), 62 Iowa, 26, 49 Am. Rep. 136; Holt v. Downs (1877), 58 N. H. 170; Hardin v. Baptist Church, 51 Mich. 137, 47 Am. Rep. 555, and cases there cited. Cf. Livingston v. Trinity Church, 16 Vroom, 230. The temporalities of the church are in the corporation, which acts through its trustees, and its action is in accordance with the wish of the majority of the society, and is presumed to be so when within its legitimate powers. The pewholders' rights are subordinate to such action. They have no title to property. Erwin v. Hurd (1884), 13 Abb. N. Cas. 91; Henry v. St. Peter's Church, 2 Edw. 608; *In re Presbyterian*

Church, etc. 3 Edw. 155; Voorhees v. Presbyterian Church, etc. 8 Barb. 137, 152, 17 Barb. 109; Abernethy v. Church of the Puritans, 3 Daly, 1, 7; Cooper v. Presbyterian Church, 32 Barb. 222, 226; Kincaid's Appeal, 66 Pa. St. 411, 5 Am. Rep. 337. Accordingly, a pewholder, as such, cannot prevent the church corporation from remodeling the church edifice, or from selling it for the purpose of removal. Erwin v. Hurd (1884), 13 Abb. N. Cas. 91.

<sup>54</sup> Holt v. Downs (1877), 58 N. H. 170.

<sup>55</sup> Richardson v. Union Congregational Soc. (1883), 58 N. H. 187; Sale v. Baptist Church (1883), 62 Iowa, 26, 49 Am. Rep. 136.

<sup>56</sup> Sale v. Baptist Church, 62 Iowa, 26 (1883), 49 Am. Rep. 136.

<sup>57</sup> Cammeyer v. United German Lutheran Churches, 2 Sandf. Ch. 186. Cf. First Parish v. Stearns, 21 Pick. 148; Angell & Ames on

surance orders, membership consists in being insured thereby.<sup>58</sup> *Mandamus* will not lie to compel a private corporation to admit to membership any qualified person making application, although

Corporations, § 114. People v. Tuttill, 31 N. Y. 550, where stated attendance upon worship during a year being requisite, it was held that regular as distinguished from occasional attendance, and personal attendance as distinguished from the attendance of the family, was essential; and that no amount of contribution to the support of the church would be accepted in lieu thereof. In Juker v. Commonwealth, 20 Pa. St. 484, it was held that an *annual* contribution of a certain amount being required, a contribution of that amount shortly before a meeting and election did not entitle the contributor to vote. Where a church charter declared that "the subscribers and such others as shall hereafter be admitted or become contributing members," should comprise the corporation, and that "any member who has contributed to the support of the church one year previous to the election about being held, a sum not less than \$2 for a pew or a portion of a pew," should have a vote. The society afterwards gave up the practice of renting pews, and announced free sittings, expenses to be met by contributions; and it was held that the change was not an infraction of the constitution, and that renting or holding a particular pew or seat was not essential to membership. Commonwealth v. Morrison, 13 Phila. (Pa.) 135. In a case in which the membership of a religious society was declared to consist of certain persons together with their families it was held that sons even after attaining majority were included within the meaning of the word family, until they should transfer their membership to some

other organization. Bradford v. Cary, 5 Me. 339. Where no one under eighteen years of age was entitled to vote in church meetings, it was held that participation in the sacrament after the age of eighteen years was requisite. Weckely v. Geyer, 11 Serg. & R. 35. Under a statute declaring that the electors of Episcopal churches shall consist "of all who shall have belonged to such church," N. Y. Laws of 1801, ch. 79, § 1, it has been held that the meaning of the word "belonged" was a mixed question of law and of fact which in each case must be left to the jury to determine. People v. Keese (1882), 21 Hun, 438. In Bates v. Houston (1882), 66 Ga. 198, it was held that a wrongful seizure and retention of the property of a church having a congregational form of government, by a minority of the members against the wishes of the majority, is a ground for equitable interference; and that relief will be granted at the suit of a few representing others having a common interest. Where the constitution of a religious corporation provides that congregation and pastor shall join some synod, and the pastor withdraws from the synod to which both have belonged, and with which a majority of the congregation vote to remain, the majority have a right to control the church property. Dressen v. Bramlier, 56 Iowa, 756.

<sup>58</sup> Sullivan v. Mutual Ins. Co., 2 Mass. 318; Mitchell v. Lycoming Mutual Ins. Co., 58 Pa. St. 402; Georgia, etc. Life Ins. Co. v. Gibson, 52 Ga. 640; Cumings v. Sawyer, 117 Mass. 30; "Benefit Associations," an annotated case, by J. O. Pierce, 22 Cent. L. J. 274.

his business may suffer by reason of his exclusion therefrom.<sup>59</sup> But when, under a statute, membership in a county medical society is necessary to the legal practice of medicine in the county, the society is *quasi-public* in its nature, and *mandamus* will issue to compel the admission of a duly qualified applicant for membership.<sup>60</sup>

**§ 1418. Rectors, pastors, priests and bishops.**—*Rectors and pastors of churches.*—The right to preach the gospel to all who choose to listen, is free to every citizen, but the right to preach it as a clergyman of an organized church with established doctrines and forms of worship, is limited by the will of the church, and when a minister enters a church, he becomes bound by the rules and subject to the ecclesiastical government of the body.<sup>61</sup> Accordingly, where the trustees insist on maintaining a minister who has been deposed by the denomination for unsoundness in faith and doctrine, members of the society may invoke the aid of a court of equity.<sup>62</sup> And where a pastor has been dismissed by a majority of the church, he may be enjoined from usurping the office and from making use of the meeting-house.<sup>63</sup> Conversely, it has been held that where the trustees of a Methodist Episcopal church, without right, but according to the wish of a majority of the members, close the church against the duly appointed preacher, they may be restrained by injunction.<sup>64</sup> The vestrymen of the parish of a Protestant Episcopal church can not indirectly remove a rector canonically elected, by reducing his salary as fixed

<sup>59</sup> *People v. Holstein Freisian Assn.* (1885), 16 Abb.'N. Cas. 307. The by-laws of the defendant association provided that the cattle of members only should be admitted to registration. The market value of unregistered cattle was less than that of the registered. But it was held that the association, although organized for the public good, was a private corporation, and that therefore *mandamus* would not lie. *Cf.* As to injunction to restrain admission to membership, *Thompson v. Society of Tammany* (1879), 17 Hun, 305.

<sup>60</sup> *People v. Medical Soc.*, 32 N. Y. 187, where it was held that the court would not interfere merely because of the applicant

having previously advertised as having especial skill in the treatment of certain diseases, a custom condemned by the code of professional ethics adopted by the society, but having no force as a general law nor as a rule of private morality, and neither the general statute of incorporation nor the by-laws of the society making *antecedent observance* of its regulations a condition of membership.

<sup>61</sup> *Chase v. Cheney*, 58 Ill. 509, 10 Am. L. Reg. 295.

<sup>62</sup> *Isham v. Fullager*, 14 Abb. N. Cas. 363.

<sup>63</sup> *Hatchett v. Mt. Pleasant Baptist Church* (1885), 46 Ark. 291.

<sup>64</sup> *Whitecar v. Michenor* (1883), 37 N. J. Eq. 6.

at the time of his election.<sup>65</sup> Where the provisions of a statute prescribe the method of fixing a minister's salary, as to corporations organized under the act, a prohibition of any other method is implied; an action, therefore, can not be maintained by a minister of a Methodist Episcopal church to recover a salary fixed by the quarterly conference, neither the statute nor the rules and regulations of the denomination recognizing such method.<sup>66</sup> Where a Romish priest is subject to removal at the pleasure of the bishop having charge over him, he is not entitled to a notice to quit the parsonage of the parish over which he had charge, under a statute requiring a notice from landlord to tenant. The relationship, in such case, of the priest and bishop, is that of master and servant, and not that of landlord and tenant.<sup>67</sup>

**§ 1419. Trustees of churches.**—The temporal affairs of churches and religious societies are managed by boards of trustees variously composed and designated under the several acts providing for their incorporation.<sup>68</sup> The trustees of a church may assign seats, and forcibly remove one from a seat occupied without authority.<sup>69</sup> A note signed by the trustees individually may bind the church.<sup>70</sup> They must act, however, as a board, and even a majority of them can not bind the corporation by signing notes not authorized at a regular meeting.<sup>71</sup> As the directors of companies having capital stock must be the owners of shares, so the trustees of religious societies, must be members thereof. And under an act requiring the place of a trustee who has ceased to be a member of the society to be declared vacant, the court may enjoin his further acts.<sup>72</sup> The New York statute provides a mode by which the question of who are the rightful trustees of a religious corporation may be determined. The question can not be

<sup>65</sup> *Bird v. St. Mark's Church*, 62 Iowa, 567 (1883).

<sup>66</sup> N. Y. Laws 1813, ch. 60, § 48; *Landers v. Frank Street Church* (1884), 97 N. Y. 119, reversing 15 Hun, 349.

<sup>67</sup> *Chatard v. O'Donovan* (1882), 80 Ind. 20, 1 Am. L. Reg. 461 (1882).

<sup>68</sup> For these acts *vide supra*, §§ 13, 1416.

<sup>69</sup> *Sheldon v. Vail* (1882), 28 Hun, 354.

<sup>70</sup> Where a note given by the trustees of a Methodist Episcopal

Church to raise money to build a church was signed by them individually without any official designation, so that it might be negotiated, it was held, that the obligation was of the church, and the church premises might be sold to pay it. *Bushong v. Taylor* (1884), 82 Mo. 660.

<sup>71</sup> *People's Bank v. St. Anthony's R. C. Church*, 39 Hun, 498.

<sup>72</sup> *First Reformed Presbyterian Church v. Bowden*, 10 Abb. N. Cas. 1; N. Y. Laws 1813, ch. 60, § 3.

settled in an action of ejectment.<sup>73</sup> In Michigan, on the question of the election of a deacon, the decision of the religious association is final. Nor is the case altered by the fact that the statute makes deacons *ex officio* trustees upon the incorporation of the society.<sup>74</sup> In Indiana, to recover possession of church property by persons claiming to be trustees, it is not necessary to determine by *quo warranto* whether plaintiffs or defendants are the legal trustees.<sup>75</sup> In a vestry composed of the rector, churchwardens and others, the rector, as a member of the vestry, is entitled to vote.<sup>76</sup>

**§ 1420. How religious societies may hold property.**—The general rule is the same as for other societies, that an unincorporated religious association, assuming a corporate name, can not hold real property in the name thus assumed.<sup>77</sup> An unincorporated society claiming to be a church, and engaged in the lawful promotion or defense of religion, is a church whose deacons may be a corporation under the law.<sup>78</sup> It has been held, however, in Massachusetts that the title to land which has been conveyed to unincorporated trustees of a religious society of the Methodist Episcopal church and their successors, in trust for the use and benefit of the society, does not vest in new trustees who may be elected from time to time, but remains in the grantees named in the deed, or the survivor of them.<sup>79</sup> And the conveyance of land to such trustees, for the use of such a society, constitutes the members of the society, beneficiaries.<sup>80</sup> A bequest of land, and a fund to trustees for the use of and to sustain a church, the whole to be transferred to the church when incorporated,—is held void.<sup>81</sup> And a bequest to an unincorporated missionary society,

<sup>73</sup> Concord Society v. Stanton (1885), 38 Hun, 1.

<sup>74</sup> Att'y-Gen. v. Geerlings, 55 Mich. 562.

<sup>75</sup> Gaff v. Greer, 88 Ind. 122.

<sup>76</sup> The charter of a Protestant Episcopal Church provided for the management of its temporal affairs by a "vestry, to be composed of the rector, churchwardens and vestry men." It was provided that the rector should be chosen by the churchwardens and vestry men, and that the vestry should consist of twelve persons, to be elected in a specified manner. A by-law provided that the "vestry" should have full power to fill vacancies

occurring in their body. It was held, that, as a member of the vestry, the rector was entitled to a vote in the election of a person to fill a vacancy. Neilson's Appeal (1884), 105 Pa. St. 180, 13 Atl. 943.

<sup>77</sup> Goesele v. Bimeler (1851), 5 McLean, 223.

<sup>78</sup> Holt v. Downs (1877), 58 N. H. 170; N. H. Gen. Stat., ch. 139, § 6.

<sup>79</sup> Peabody v. Eastern Meth. Soc. (1863), 87 Mass. 540.

<sup>80</sup> Peabody v. Eastern Meth. Soc. (1863), 87 Mass. 540.

<sup>81</sup> Holmes v. Mead (1873), 52 N. Y. 332.

which after the death of the testator was merged into the defendant society and incorporated, is invalid.<sup>82</sup> A statute which provides for the conveyance by the proper church officers of land held for the purpose of public worship, does not enlarge the capacity of an unincorporated local religious association to take personal property, under a will probated before the section was enacted.<sup>83</sup> But, generally, it has been decided that a private corporation may take a bequest in trust for religious uses,<sup>84</sup> and the common law, so far as it relates to churches of the Episcopal persuasion in this country,—the right to present to such churches,—and the corporate capacity of the parsons thereof to take in succession, has been expressly recognized by the highest authority.<sup>85</sup> Under laws restricting the amount of land which religious corporations may hold, only corporations formed for the purpose of religious worship, (and not benevolent or missionary societies,) are intended to be restricted in their ownership of real estate.<sup>86</sup> Where the general act restricts religious corporations to ten acres of land, while another act provides that Roman Catholic societies may hold property, but specifies no limitation, upon ejectment brought by such a society, the limitation imposed by the general law is applicable, and it, having ten acres, is unable to acquire additional land by devise.<sup>87</sup> A late case made numerous important rulings upon this subject, based upon the Declaration of Rights of Maryland, which declared that every sale of land to a religious body, without leave of the legislature, should be void, except sales of not more than two acres, to be used for a meeting-house or burial ground. It imposed no restriction on the power of the legislature in granting such leave, but authorized it to declare limitations or not, in its discretion, both as to the extent and quality of the estate to be purchased, and the purposes for which it should be used. The court held, that thereunder, the legislature could not only grant leave to a religious body to make a future purchase, but could also, by subsequent legislation, ratify and sanction a void

<sup>82</sup> *Owens v. Missionary Soc.*, 52 N. Y. 380 (1856).

<sup>83</sup> *Rhodes v. Rhodes* (1890), 88 Tenn. 537; *Code Tenn.* § 2008.

<sup>84</sup> *Protestant Episcopal Education Society v. Churchman*, 80 Va. 718.

<sup>85</sup> *Angell & Ames on Corporations* (11th ed.), § 70; *Pawlett v. Clark*, 9 *Cranch*, 294.

<sup>86</sup> *Gilmer v. Stone* (1887), 120 U. S. 586.

<sup>87</sup> *St. Peter's Roman Catholic Congregation v. Germain*, 104 Ill. 440. [Craig and Dickey, JJ., dissenting, on the ground that the question is one between the corporation and the state, alone, in which individuals have no concern.]

purchase, previously made. It also held that where such power was granted to a religious corporation without restricting it as to the quality of the estate to be acquired, but limiting the purposes for which it shall be used, a fee-simple estate may be acquired and held; and that when a fee-simple estate is so acquired, a subsequent legislature has power, with consent of the corporation, to change or abrogate altogether the restrictions as to the use of the land.<sup>88</sup> A statute which limits the amount of land that can be held by any "corporation formed for religious purposes," does not apply to a "Young Men's Christian Association," although its articles show that it was organized as a corporation "not for pecuniary profit;"—such association not being under the control of any one religious denomination, and not being formed for the purpose of religious worship.<sup>89</sup>

**§ 1421. Rights of pew-holders in churches.**—In this country, a church may be built by a parish, an incorporated society, or by an individual.<sup>90</sup> "The persons who built a meeting-house in either of these ways may retain the fee, and maintain an action of trespass for an injury to yard or buildings; and the right to a seat or to the pews may be in other individuals entirely distinct from them. The interest of the pewholders is several. They have an exclusive right to occupy a particular seat, to the exclu-

<sup>88</sup> Trustees v. Manning (Md. 1890), 19 Atl. Rep. 599. The facts in this case were as follows: A religious corporation, having with leave of the legislature acquired six acres of land for use as a burial ground, afterwards purchased six and one-half acres additional, but the latter purchase was void, because not made with legislative sanction. Subsequently, by Acts Md. 1845, ch. 284, the corporation was authorized by purchase, to enlarge, to the extent of twenty-five acres, the burial ground then owned by them, which included the six and one-half acres. And it was held that the act was a ratification and sanction of the six and one-half acre purchase, though it did not expressly refer to it. Further, Acts Md. 1814, ch. 2, authorizing a religious corporation to purchase land, with-

out other limitation except as to its use as a burial ground, and Acts Md. 1886, ch. 280, providing for opening streets through the burial ground so purchased, gave the corporation leave to remove the bodies, and declared that it should acquire the full ownership in fee-simple of the land, and might sell and convey the same. And upon this point it was decided that, under leave given by the act of 1814, the corporation could acquire a fee-simple estate in land, subject only to the restriction as to its use, which was removed by the act of 1886.

<sup>89</sup> Hamsher v. Hamsher (1890), 132 Ill. 273, 23 N. E. Rep. 1123; Rev. Stat. Ill., ch. 32, § 42.

<sup>90</sup> Kellogg v. Dickinson, 18 Vt. 266; Bakersfield Congregational Soc. v. Baker, 15 Vt. 119, 40 Am. Dec. 668.

sion of all others, when the house is used for the purpose for which it was erected."<sup>91</sup> "Pews constitute a subject of peculiar ownership. They are defined to be inclosed seats in churches, and it is said that, according to modern use and idea, they were not known till long after the Reformation, and that inclosed pews were not in general use before the middle of the seventeenth century,—being for a long time confined to the family of the patron."<sup>92</sup> In England the right of property in a pew is a mere easement or incorporeal right, and hence the English doctrine that an action on the case only, will lie for disturbance of the occupant.<sup>93</sup> But in this country the owner of a pew has an exclusive right to its possession and enjoyment for the purpose of public worship, not as an easement, but by virtue of an individual right of property, derived in theory at least, from the proprietors of the edifice or freehold, and hence trespass *quare clausum* lies for a violation of the owner's right of possession. It is now well settled in this country, that in the absence of any statutory provisions, this kind of property is to be considered as real estate, in all cases arising under the statute of frauds, or of conveyances, or of descents and distributions.<sup>94</sup> The rights thus acquired are, however, limited, and are subject to the right of the society to have the meeting-house in such place as will best accommodate the whole. A reservation of this right is implied in the grant of a pew in a house of public worship. The convenience of individuals must in such cases be subject to the general convenience of the whole, and whoever purchases a pew, purchases it subject to this right of the society.<sup>95</sup> Pewholders have merely a qualified and usufructuary right in their pews, subject to the right of the religious society to remodel them, and to alter the internal structure of the buildings, or enlarge or remove it, or sell the edifice and rebuild else-

<sup>91</sup> Kellogg v. Dickinson, 18 Vt. 266; quoted in O'Hear v. De Goesbriand, 33 Vt. 593, 80 Am. Dec. 653.

<sup>92</sup> Hook's Church Dict. *tit. "Pews,"* quoted in O'Hear v. De Goesbriand, 33 Vt. 593, 80 Am. Dec. 652.

<sup>93</sup> O'Hear v. De Goesbriand, 33 Vt. 593, 80 Am. Dec. 653.

<sup>94</sup> O'Hear v. De Goesbriand, 33 Vt. 593, 80 Am. Dec. 653, citing 1 Greenleaf's Cruise on Real Property, 44; Shaw v. Beveridge, 3 Hill, 26, 38 Am. Dec. 616; Jack-

son v. Rounseville, 5 Met. 127; Kellogg v. Dickinson, 18 Vt. 266; Hodges v. Green, 28 Vt. 358; Barnard v. Whipple, 29 Vt. 402, 70 Am. Dec. 422; First Baptist Church v. Bigelow, 16 Wend. 28; Vielie v. Osgood, 8 Barb. 130.

<sup>95</sup> Fisher v. Glover, 4 N. H. 180, per Clark, J. Cf. "Property in Church Pews," by W. C. Schley, 19 Am. L. Reg. (N. S.) 1, 65; "Rights of Pewholders," by James A. Seddon, 15 Cent. L. J. 101.

where.<sup>96</sup> It is said, however, that in case of altering or removing a pew, compensation must be tendered the holder.<sup>97</sup>

**§ 1422. Withdrawal from membership. Secession. Expulsion.**—Persons voluntarily withdrawing from associations or societies, not having capital stock, are deemed to abandon their property rights therein.<sup>98</sup> Thus, under a conveyance of land to trustees “for the use and benefit of the colored members of the Methodist Episcopal Church South” it was held that members who withdrew and organized themselves as a part of the “African Methodist Episcopal Church of the United States of America” had no title to the property as against the “Methodist Episcopal Church South.”<sup>99</sup> And, even though the seceding members constitute a majority of the body, they can not carry the common property with them.<sup>1</sup> Thus, where the majority of the members of an unincorporated benevolent lodge withdrew from the jurisdiction of the grand lodge and surrendered their charter, the minority who continued steadfast in their allegiance, and to whom the charter was again delivered, were held to be entitled to the property of the lodge.<sup>2</sup> So, also, persons who withdraw from a church and, establishing another organization, cease to maintain the original organization according to the method of procedure established for the perpetuation of its existence and preservation of its identity, can not, even though a majority, claim to constitute the original church or be entitled to its property.<sup>3</sup> The

<sup>96</sup> *Sohier v. Trinity Church*, 109 Mass. 1; *Guy v. Baker*, 17 Mass. 438, 9 Am. Dec. 159; *Daniel v. Wood*, 1 Pick. 102, 11 Am. Dec. 151; *Fassett v. First Parish in Boylston*, 19 Pick. 361, 3 Kent. Com. 533; *Kimball v. Second Parish in Rowley*, 24 Pick. 347. “A pewholder’s right is only a right to occupy his pew during public worship; and when the meeting-house is in such a ruinous condition that it cannot be and is not occupied for public worship, he can recover only nominal damages for injury to his pew.” *Howe v. Stevens*, 47 Vt. 262. “Pewholders, in the ordinary cases of meeting-houses or churches, built by incorporations under the statute, have only a right of occupancy to their

seats, subject to the superior right of the society owning the pew.” *Perrin v. Granger*, 33 Vt. 101. See further “Pews or Seats in Parish Churches,” 1 L. Mag. 574, and 2 L. Mag. 1.

<sup>97</sup> *James v. Towne* (1878), 58 N. H. 462, 42 Am. Rep. 602.

<sup>98</sup> *Altmann v. Benz*, 27 N. J. Eq. 331; *Smith v. Smith*, 3 Desaus. 557; *Isham v. Trustees of First Pres. Church of Dunkirk*, 63 How. Pr. 465.

<sup>99</sup> *Brown v. Monroe*, 80 Ky. 443.

<sup>1</sup> *Gaff v. Greer*, 88 Ind. 122, 45 Am. Rep. 449.

<sup>2</sup> *Altmann v. Benz*, 27 N. J. Eq. 331. See, also, *Smith v. Smith*, 3 Desaus. 557.

<sup>3</sup> *Holt v. Downs* (1877), 58 N. H. 170, 181.

members adhering to the articles of belief, or rather, to the original organization, are entitled to be continued in the use and enjoyment of the society's property.<sup>4</sup> For, religious societies are legal charities, and fall within the equitable jurisdiction of courts of chancery, which will assist them to prevent a diversion of the trust property, whether in an attempt to take it, when held for a special purpose in connection with a particular congregation, or to take it into independency, or to another denomination.<sup>5</sup> But whether the seceding members be dissenters,<sup>6</sup> or whether they still retain the same religious belief, they are considered to relinquish all claims upon the property of the society, by withdrawing from the organization.<sup>7</sup> The fact that the original organization has for thirty years permitted the seceding members to use the church building on alternate Sabbaths, does not entitle the latter to interfere to prevent the demolition of the building with a view to the erection of a larger one.<sup>8</sup>

*Expulsion.*—A religious society, incorporated, and without capital stock, its business and property being managed by trustees, is not liable for expulsion of a member.<sup>9</sup>

**§ 1423. Decisions of church tribunals.**—The civil courts, in determining the questions of legitimate succession in cases of separation between parts of organized religious societies, will adopt ecclesiastical rules, and enforce the polity of the church as far as practicable.<sup>10</sup> When in a case of disruption of a religious organization there is doubt as to which of the contending parties constitutes the original organization, the decision of the ecclesiastical court, even though in favor of the minority, is binding upon

<sup>4</sup> *Isham v. Trustees of First Pres. Church of Dunkirk* (1882), 63 How. Pr. 465, *per* Daniels, J.

<sup>5</sup> *Christ Church v. Holy Communion Church*, 14 Phila. 61.

<sup>6</sup> *Isham v. Dunkirk*, 63 How. Pr. 465.

<sup>7</sup> *Dew v. Bolton*, 12 N. J. 206; *Groesbeck v. Dunscomb*, 41 How. Pr. 302.

<sup>8</sup> *Landis' Appeal*, 102 Pa. St. 467.

<sup>9</sup> *Reinke v. German, etc. Church* (S. D. 1903), 96 N. W. 90; *Vide supra*, §§ 565-571, ADMISSION AND EXPULSION OF MEMBERS OF UNINCORPORATED ASSOCIATIONS.

<sup>10</sup> In White Lick Quarterly

Meeting v. White Lick Quarterly Meeting, 89 Ind. 136, a legacy was left to the White Lick Quarterly Meeting of Friends, and was claimed by each of two meetings bearing that name, one of which had seceded from the original. And it was held in accordance with the rule stated in the text that the legacy must be deemed to belong to the body remaining in the meeting house after the withdrawing members left it, this body, moreover, having been since continuously recognized by the Yearly Meeting as the true White Lick Quarterly Meeting.

the civil courts.<sup>11</sup> The proceedings of ecclesiastical courts, on matters within their jurisdiction, will not be reviewed by the civil courts.<sup>12</sup> Where a congregation worships according to the forms of the Roman Catholic church, but has never placed itself under the head of the diocese; and in opposition to the archbishop, bought and paid for the church property in the name of a trustee, and employed and paid a pastor in ignorance that he had been assigned by the archbishop, the court is without power to decree that the trustee holding the title to the church property shall convey it to the archbishop.<sup>13</sup> The trustees of a religious corporation have no power to remove a priest, against the will of the members of the church.<sup>14</sup> The courts will not review the acts of religious societies, except, when civil rights are involved, to determine whether the act is the act of the proper authority. A majority of the members of a religious society may dismiss its pastor, without trial, or charges, or notice.<sup>15</sup>

<sup>11</sup> Gaff v. Greer, 88 Ind. 122, 45 Am. Rep. 449, where the decision by a presbytery of the Presbyterian Church that certain members of a local church had seceded, and that therefore the church property belonged to those remaining, though a minority, was held binding upon the civil courts.

<sup>12</sup> Irvine v. Elliott (Pa. 1903), 55 Atl. 859.

<sup>13</sup> Dochkus v. Lithuanian, etc. (1903), 206 Pa. 25.

<sup>14</sup> Rapaillion v. Manusas, 108 Ill. App. 272.

<sup>15</sup> Morris, etc. Church v. Dart, (1903), 67 S. C. 338, 45 S. E. 763.

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- actions, suits.
- authority, power.
- adoption, ratification.
- abuse, misuser of corporate franchises.
- articles of incorporation, articles of association.
- assets, property.

[References are to secs.: Vol. I, §§ 1-432; Vol. II, §§ 433-981; Vol. III, §§ 982-1423.]

WORDS AND TERMS USED SYNONYMOUSLY (continued)—

alienation, conveyance, sale.  
amalgamation, merger, consolidation.  
annual meeting, stated meeting.  
*cestui que trust*—beneficiary.  
citizen, resident.  
called meeting, special meeting.  
certificate of incorporation, articles of association.  
certificates of stock, shares of stock.  
charter, articles of incorporation, certificate of incorporation.  
charter, franchise.  
corporation, company.  
creation, incorporation.  
custom, usage.  
charges, rates.  
corporator, incorporator.  
cancellation, rescission, surrender of shares.  
compliance with conditions of contract, performance of conditions.  
corporate existence, term of incorporation.  
domicile, residence, citizenship.  
fictitious stock, watered stock, spurious stock.  
forfeiture, dissolution.  
franchise, charter.  
fiduciary, trustee.  
fine, penalty.  
filing, recording.  
federal, United States.  
garnishment, trustee process.  
guaranteed stock, preferred stock.  
incorporation, creation.  
knowledge, notice.  
national corporation, federal, interstate.  
members, stockholders, shareholders.  
merger, consolidation, amalgamation.  
minutes of meeting, record of meeting.  
monopoly, "trust," restraint of trade.  
objects, purposes, undertaking.  
overissued stock, spurious stock, watered stock.  
ouster from franchise, forfeiture of charter.  
"pool," trust, monopoly.  
property, assets.  
penalty, fine.  
power, authority.  
purchase-price, lien, vendor's lien.  
police power, legislative control.  
purposes, objects.  
power companies, electric power, water power companies.  
preferred stock, guaranteed stock.  
purchaser, transferee, vendee.  
*quasi-public* corporation, public-service corporation.  
railroad, railway.  
recording, filing.  
registry, registration, record.  
rescission, cancellation, surrender.  
release, surrender, cancellation.  
regular meeting, stated meeting, annual meeting.  
rates, charges.  
renewal, revivor, revival, extension of charter.  
sale, transfer, alienation.  
spurious stock, overissued stock, watered stock.

[References are to secs.: Vol. I, §§ 1-432; Vol. II, §§ 433-981; Vol. III, §§ 982-1423.]

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- stockholder, shareholder.
- surplus profits, net profits.
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- "undertaking," plan, object, purpose of corporation.
- unauthorized acts and contracts, *ultra vires* acts and contracts.
- voluntary association, unincorporated company.
- vendor's lien, purchase-price, mortgage.
- visitation of corporation, legislative control of.
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